WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON SUPERVISED RELEASE AND DISCHARGE OF SEXUALLY VIOLENT PERSONS

FROM: Katie Bender-Olson and Michael Queensland, Staff Attorneys

RE: Options for Study Committee Consideration

DATE: September 27, 2012

This Memo provides a description of various legislative options for committee discussion. The Memo is intended to help the committee identify what, if any, recommendations it will include in draft legislation.

This list of options is not exhaustive; committee members may have other suggestions for the committee to consider. Also, some options are more developed than others based on available information. It should also be noted that the Department of Justice (DOJ) proposals will be sent to committee members in a separate document.

BURDEN OF PROOF FOR PROVING SUPERVISED RELEASE CRITERIA – BURDEN ON SVP

Option for Legislation: Provide that the sexually violent person (SVP) bears the burden of proof regarding supervised release criteria and clarify that the applicable level of proof is clear and convincing evidence.

Source of Option: This option arises from statements by Assistant Attorney General (AAG) Mike Schaefer and committee discussion at the September 19th meeting.

Discussion: The statutes setting forth the procedure for supervised release do not specify whether the SVP petitioning for supervised release or the State has the burden of proof regarding whether the SVP meets the criteria for supervised release. The criteria that an SVP must meet before he may be granted supervised release are set forth in s. 980.08 (4) (cg), Stats., which provides as follows:

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> 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 of Health Services (DHS).
>
> 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.

The Wisconsin Supreme Court resolved the issue of which party bears the burden of proof by holding that the SVP petitioning for supervised release bears the burden to prove he meets each of the criteria by clear and convincing evidence. [*State v. West*, 2011 WI 83.]

Given the Wisconsin Supreme Court's holding, an SVP petitioning for supervised release bears the burden of proving he meets the supervised release criteria by clear and convincing evidence. If the committee agrees that the SVP should bear the burden of proof by clear and convincing evidence, the committee does not need to take any action. However, since the statutory language does not explicitly state that the petitioner bears the burden of proof, it is possible a future court may reverse the holding and decide that the State bears the burden by a different level of proof.

The committee may wish to propose amending the current statutory language to specifically assign the burden of proof to the petitioning SVP and to clarify that the burden is by clear and convincing evidence.

BURDEN OF PROOF FOR PROVING SUPERVISED RELEASE CRITERIA – BURDEN ON STATE

Option for Legislation: Provide that the State bears the burden of proof regarding supervised release criteria, rather than the SVP. This option is directly contrary to the prior option for legislation.

Source of Option: This option arises from statements by Assistant Public Defender Vincent Rust.

Discussion: As noted above, the statutes setting forth the procedure for supervised release do not specify whether the SVP petitioning for supervised release or the State bears the burden of proof regarding whether the SVP meets the criteria for supervised release. However, pursuant to a decision by

the Wisconsin Supreme Court in *State v. West*, 2011 WI 83, the SVP currently bears the burden of proof. A statutory change could specify that the State bears the burden of proof regarding supervised release. Such a statutory change would supplant the holding in *State v. West* and alter current practice.

TIME PERIOD APPLICABLE TO THE DISCHARGE PLEADING REQUIREMENT

Option for Legislation: Specify a different time period during which an SVP must establish that his condition has changed in order to be granted a discharge hearing. For example, the statute could require the SVP to show that his condition has changed since the most recent determination by a court or jury that the SVP remains an SVP.

Source of Option: This option arises from statements by AAG Schaefer and Assistant District Attorney (ADA) Holly Bunch and from committee discussion at the September 19th meeting.

Discussion: Current law specifies that a court must deny an SVP's petition for discharge 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." [s. 980.09 (1), Stats.]

In order for an SVP to receive a discharge hearing, he must show that his condition has changed since the date of his initial commitment order, which may have been years or decades ago. Because the statutory language refers to a change since the initial commitment order, it appears that any change occurring since that time is sufficient to allow the SVP a discharge hearing each year.

The committee may wish to propose amending the current statutory language to clarify that an SVP must show his condition has changed since the most recent court or jury determination that the individual is still an SVP, rather than showing his condition has changed since his initial commitment.[1] Changing the time period applicable to the discharge pleading requirement may prevent a court from holding yearly discharge trials to consider the same evidence or testimony that was previously considered.

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[1] Mr. Schaefer indicated in his remarks that, even under current law, some courts will not grant a discharge hearing unless the SVP can show his condition has changed since the most recent court or jury determination that he is still an SVP. He also stated that two Wisconsin Court of Appeals cases, *State v. Kruse* and *State v. Combs*, support his position.

The Wisconsin Court of Appeals addressed the question of whether an SVP petitioning for discharge adequately showed that his condition had changed such that he was entitled to a discharge hearing in *State v. Kruse*, 2006 WI App 179, and *State v. Combs*, 2006 WI App 137. The Wisconsin Court of Appeals held in each case that the SVP was not entitled to a discharge hearing, even though a mental health professional's report concluded the respective SVP was not likely to commit a new sexually violent offense. The court in both *Kruse* and *Combs* stated that the expert's opinion did not constitute a sufficient "change" because the opinion was based only on facts, professional knowledge, and research that had already been considered by other experts prior to the SVP's initial commitment trial. [*Kruse*, 2006 WI App ¶ 42; *Combs*, 2006 WI App at ¶ 32.]

Though *Kruse* and *Combs* involved previous versions of the discharge statute, the holding arguably applies under the current statute. The Wisconsin Supreme Court referenced *State v. Kruse* in a subsequent SVP discharge case and stated that *Kruse* would have been decided in the same manner, even under the current standard. [*See State v. Arends*, 2010 WI 46, n. 21.]

REVIEW OF A DISCHARGE PETITION

Option for Legislation: Amend s. 980.09, Stats., regarding petitions for discharge, to make the language consistent when describing the court's task in reviewing a discharge petition.

Source of Option: This option arises from statements by AAG Schaefer and from committee discussion at the September 19th meeting.

Discussion: The statute governing discharge proceedings, s. 980.09, Stats., uses inconsistent language to describe the court's task in reviewing a discharge petition. The statute states that a court reviews a discharge petition to determine if the petition "contains facts" from which a court or jury may conclude that the petitioner does not meet the criteria for commitment as an SVP. However, the statute also states that the court must consider certain reports when considering whether "facts exist" which would allow a court or jury to reach this conclusion.

AAG Schaefer believes the inconsistent language creates confusion about a court's review. He reports that practitioners are unsure whether a court's responsibility to determine whether a discharge petition "contains facts" and its responsibility to determine whether "facts exist" are the same responsibility.

The committee may wish to propose amending the current statutory language to clarify either that a court reviews a petition to determine whether "facts exist" or that the court reviews a petition to determine whether the petition "contains facts."

STIPULATION FOR SUPERVISED RELEASE

Option for Legislation: Permit a court to authorize supervised release for an SVP when the prosecution and the SVP stipulate that supervised release is appropriate.

Source of Option: This option arises from statements made by Assistant Public Defender Vincent Rust.

Discussion: Under current law, a court must find that an SVP meets five specified criteria before the court may order the SVP to supervised release. The statutory language expressly prohibits the court from permitting supervised release under any other circumstances, stating: "The court may not authorize supervised release unless…the court finds that all of the following criteria are met." [s. 980.08 (4) (cg), Stats.] An SVP who fails to meet any one criterion cannot be granted supervised release, even if the individual meets all other criteria and the parties agree that supervised release is the most appropriate outcome for the individual. Mr. Rust noted that, in cases where an SVP may qualify for discharge, allowing stipulations for supervised release would enable a court to order an SVP to supervised release before considering discharge.

"SIGNIFICANT PROGRESS IN TREATMENT" CRITERION FOR SUPERVISED RELEASE

Option for Legislation: Revise or eliminate the criterion requiring an SVP to make significant progress in treatment before he may be granted supervised release.

Source of Options: This option arises from statements made by Assistant Public Defender Vincent Rust, committee discussion at the September 19th meeting, and a proposal from DHS.

Discussion: Under current law, an SVP must meet five specified criteria before a court may authorize supervised release, including that the person "has made significant progress in treatment and the person's progress can be sustained while on supervised release." [s. 980.08 (4) (cg), Stats.] An SVP who cannot establish significant progress in treatment is ineligible for supervised release, even if he meets all other criteria. Mr. Rust and Mr. Rios indicated that the "significant progress in treatment" criterion is the most difficult for many SVPs to meet and often precludes an otherwise eligible SVP from being granted supervised release. At the September 19th meeting, committee members discussed the possibility of revising the definition of "significant progress in treatment," but no specific proposals were put forward.

Since the September 19th meeting, DHS has put forth a specific proposal that would change this criterion to require that the SVP "is making significant progress," instead of the current standard that he "has made significant progress in treatment." In addition, DHS has proposed amending the definition of "significant progress in treatment." Under current law, "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 risk to reoffend offered at the facility where the person is civilly committed.

- Participated in the treatment program at a level that was sufficient to allow the identification of his 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 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.

Rather than requiring the SVP to show that he has completed each of the listed requirements, DHS is proposing that the SVP be required to show that he is currently working towards each of the listed requirements.

BURDEN OF PROOF IN DISCHARGE HEARING

Option for Legislation: Shift the burden of proof at a discharge hearing from the State to the SVP petitioning for discharge.

Source of Option: This option arises from statements made by ADA Holly Bunch and was addressed by AAG Mike Schaefer.

Discussion: The State bears the burden of proof at a discharge hearing to establish that an SVP petitioning for discharge still qualifies as an SVP. This means that the prosecution must prove by clear and convincing evidence that the individual has been convicted of a sexually violent offense and suffers from a mental disorder that makes it likely the individual will engage in future acts of sexual violence.

In response to committee member inquiries, AAG Schaefer stated that shifting the burden of proof to the SVP petitioning for discharge is unlikely to be found constitutional if challenged. He explained that because due process requires the State to bear the burden of proving that an individual qualifies as an SVP at the initial commitment stage, it likely also requires the State to bear the burden of proving that an individual qualifies for continued commitment.

LIMIT SVP'S ABILITY TO PETITION FOR DISCHARGE TO ONCE PER YEAR

Option for Legislation: Limit the frequency with which an SVP may petition for discharge from commitment. For example, the language could limit an SVP to filing once per year.

Source of Option: This option arises from statements made by ADA Holly Bunch.

Discussion: Under current law, an SVP may petition for discharge "at any time." This may result in the same SVP having multiple, concurrent discharge petitions pending before a court. Limiting the ability of an SVP to petition for discharge would render discharge petitions more similar to petitions for supervised release. Petitions for supervised release may only be filed if at least one year has passed since the last supervised release petition was filed.

It should be noted that the ability to petition for discharge and the ability to petition for supervised release likely have different impacts on the constitutionality of ch. 980 civil commitments. As stated by AAG Schaefer in his testimony, the ability for an SVP to seek review of whether the SVP still meets the criteria for commitment is critical to the constitutionality of civil commitment procedures.

GRANT COURTS AUTHORITY TO ALLOW CONTINUANCES AND ADJOURNMENTS FOR CAUSE IN DISCHARGE HEARINGS

Option for Legislation: Specify that a court may grant a continuance or an adjournment for cause in a discharge hearing.

Source of Option: This option arises from statements made by ADA Holly Bunch.

Discussion: Unlike the statutory sections addressing initial commitment, the statutory section addressing discharge hearings does not explicitly allow a court to grant a continuance or an adjournment of a discharge hearing.

The statutory provision addressing an initial commitment trial provides that a court "may grant one or more continuances of the trial date for good cause upon its own motion, the motion of any party or the stipulation of the parties." [s. 980.05 (1), Stats.] A court may need to grant a continuance when scheduling or other conflicts prevent a case from going to trial within 90 days of the probable cause hearing, as required by the statute. In contrast, the statutory provision addressing time limits for discharge hearings does not specifically provide authority for a court to grant a continuance. The

discharge hearing provision states that 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." [s. 980.09 (3), Stats.]

It should be noted that a court's failure to comply with the 90-day requirement for holding a discharge hearing does not affect jurisdiction or create grounds for appeal under current law. Chapter 980 specifically states that a court's failure to comply with time limits does not deprive a court of personal or subject matter jurisdiction, nor does it provide grounds for an appeal. [s. 980.038 (5), Stats.]

CREATE A DISCHARGE PLEADING REQUIREMENT THAT DENIES A DISCHARGE HEARING UNLESS THE SVP HAS PREVIOUSLY BEEN ON SUPERVISED RELEASE

Option for Legislation: Require the court to deny a discharge petition without a hearing unless the SVP alleges that he is currently on, or was previously on, supervised release from commitment.

Source of Option: This option arises from committee discussion at the August 8th and September 19th meetings.

Discussion: Under current law, an SVP must meet a pleading requirement before he is entitled to a discharge hearing on his petition for discharge. The existing pleading requirement does not relate to supervised release, but instead, compels an SVP to allege facts in his petition from which a court or jury could conclude that the SVP's condition has changed since he was initially committed such that the SVP no longer meets the criteria for commitment as an SVP. If the SVP does not allege facts showing a change in his condition, then the court must deny the petition without holding a discharge hearing.

It should be noted that the ability to petition for discharge is important to the constitutionality of ch. 980 commitments. As stated by AAG Schaefer in his testimony, the ability for an SVP to seek review of whether the SVP still meets the criteria for commitment is critical to the constitutionality of civil commitment procedures. Given that the ability to seek review is critical for the constitutionality of ch. 980 commitments, there may be a level at which a pleading requirement that limits access to discharge hearings becomes unconstitutional. Additionally, an individual who does not meet the statutory criteria for being an SVP may not be constitutionally held pursuant to ch. 980, regardless of whether the individual has ever been spent time on supervised release. However, the case law does not specify whether, or at what point, a discharge pleading requirement becomes unconstitutionally onerous.

AMEND THE SVP DEFINITION TO INCLUDE AN ALTERNATIVE LEVEL OF REOFFENSE RISK

Option for Legislation: Change the definition of a "sexually violent person" to no longer require that an individual be "likely" to commit a new act of sexual violence. For example, the definition could require that an individual pose an "unreasonable risk" of committing a new act of sexual violence.

Source of Option: This option arises from committee discussion at the September 19th meeting.

Discussion: To be committed under ch. 980, an individual must be a "sexually violent person." An SVP is an individual who has been convicted of a sexually violent offense and who is dangerous before he suffers from a mental disorder that makes it "likely" he will engage in future acts of sexual

violence. "Likely" has been interpreted to mean more likely to happen than not to happen, or as more than a 50% chance of re-offense. [*See State v. Smalley*, 2007 WI App 219, ¶¶ 10-12.]

The case law does not specify a particular threshold of dangerousness that an individual must meet before he may be civilly committed. As noted by AAG Schaefer, a commitment procedure must be narrowly tailored to address the state's interest in protecting the public from those with dangerous mental disorders. The courts have not resolved the precise level of re-offense risk that an individual must pose. Thus, there is no explicit requirement that the threshold be above 50%.

ADD TO THE LIST OF PURPOSES FOR WHICH AN SVP MAY LEAVE HIS HOME

Option for Legislation: Expand the list of activities for which an SVP may leave his home under direct supervision.

Source of Option: This option arises from a proposal by DHS.

Discussion: Under current law, an SVP may not leave his home during the first year of supervised release except for outings that are under the direct supervision of a Department of Corrections (DOC) escort and that are for employment purposes, for religious purposes, or for caring for the person's basic living needs. DHS is proposing that an SVP also be permitted to leave his residence during the first year of supervised release for volunteer purposes, educational purposes, treatment and exercise purposes, and residence maintenance purposes. DHS is also proposing that all outings during the first year of supervised release must be preapproved by DHS. The DHS proposal would maintain the current requirement that SVPs must be under direct supervision of a DOC direct escort during the first year of supervised release.

ALLOW DHS TO PLACE FEMALE SVPS AT THE WISCONSIN WOMEN'S RESOURCE CENTER

Option for Legislation: Allow DHS to place female SVPs at the Wisconsin Women's Resource Center.

Source of Option: This option arises from a proposal by DHS.

Discussion: Under current law, DHS may place female SVPs at the Sand Ridge Secure Treatment Center, the Wisconsin Resource Center, a mental health facility provided by DOC, the Mendota Mental Health Institute, or the Winnebago Mental Health Institute. DHS is proposing that it also be authorized to place female SVPs at the Wisconsin Women's Resource Center. Currently, Wisconsin has no female SVPs.

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