STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT X

Case No. XXXXAPXXX-NM

In re: the Commitment of John Smith:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JOHN SMITH,

Respondent-Appellant.

On Appeal from an Order Denying
A Petition for Discharge Under Wis. Stat. § 980.09
Entered in Bay County Circuit Court,
Judge Grover Cleveland, Presiding

NO MERIT BRIEF OF DEFENDANT-APPELLANT PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

STATEMENT OF ISSUE THAT MIGHT BE RAISED ON APPEAL

Did the circuit court erroneously deny Smith's petition for discharge without a full hearing?

The trial court denied the petition for discharge Smith filed under Wis. Stat. § 980.09 without a hearing, holding that Smith's petition did not allege facts from which a court or jury might conclude that his condition has changed since his initial commitment such that he no longer meets the criteria for commitment. (190).

STATEMENT OF THE CASE AND THE FACTS

In 2004 the state filed a petition under Wis. Stat. § 980.02(1) alleging that Smith was a sexually violent person. (1:1-13). Smith entered an admission to being a sexually violent person and he was committed to the Department of Health and Family Services for control, care, and treatment. (61:1-2; 62; 75).

After Smith's commitment, the department conducted annual re-examinations as required by Wis. Stat. § 980.07(1). (80; 103; 141; 178; 188). Smith also filed petitions for discharge; some were withdrawn, the rest were denied. (100; 115; 120; 127; 132; 137; 142; 180; 183). The petition Smith filed in December 2008, (142), was denied after a trial to the court. (166; 171; 175; 176). This court summarily affirmed in a no merit appeal taken from the order. (187).

The re-examination pertinent to this appeal was conducted in June 2010. The report of that examination came to a different conclusion than preceding evaluations. The

examiner, John Watson, concluded that Smith should be discharged because he "would *not* more likely than not commit another sexually violent offense if he were released and given the opportunity" and so "is *not* a sexually violent person therefore meets the criteria for discharge in § 980.09(3)." (188:8 (emphasis in original)).*

In Watson's opinion, Smith continued to have a mental disorder—antisocial personality disorder and borderline personality disorder—that predisposed him to commit acts of sexual violence. (188:3-4). He rejected two diagnosis reached by prior examiners—paraphilia NOS and exhibitionism—on the grounds that the diagnostic criteria were not met because Smith did not apparently expose himself to strangers and was not evidently sexually aroused by exposing himself. (*Id*.). Further, Watson said that even if those disorders could be diagnosed, they did not predispose Smith to commit sexually violent acts as defined in Wis. Stat. § 980.01(1b) and (6). (188:4).

Watson also applied the Static-99R actuarial instrument as recently updated with new normative data and concluded that using that instrument Smith presented a high risk to reoffend by committing another sex offense. (188:5). However, Watson concluded that Smith did not meet the standard of being "more likely that not" to commit future acts of "*violent* sexual recidivism." (*Id*. (emphasis in original)). Watson explained that while Smith was likely to reoffend by committing sexual offenses, he could not say that Smith was more likely to reoffend by committing one of the offenses in the narrower class of sexually violent offenses as defined

* This no merit report cites to the corrected version of the report submitted by Watson. The report initially submitted had a typographical error. (178; 183:8; 185).

under Wis. Stat. § 980.01(1d) and (6). (*Id.*). Watson noted that Smith had not reduced any of the dynamic risk factors, but that did not alter the low risk of sexually violent recidivism. (188:6).

On September 27, 2010, on the strength of Watson's evaluation, Smith filed a petition for discharge under Wis. Stat. § 980.09. (180). His appointed attorney also filed a petition on his behalf. (183). The State filed a written response, asserting that neither the petition nor Watson's report set forth facts indicating a change in Smith's condition relative to risk, as required by Wis. Stat. § 980.09. (184). Smith's attorney filed a response to the state. (186). The court agreed with the State and denied Smith's request for discharge. (190).

Smith filed a document that was construed as a notice of appeal, which was subsequently dismissed so Smith could file a notice of intent to pursue postconviction relief. (191; 194; 195). Undersigned counsel was appointed to review the case and filed a notice of appeal on May 31, 2011. (199). However, while working on the brief counsel concluded there were no issues of arguable merit, so counsel moved to convert the case to a no merit appeal and now files this no merit report.

ISSUE THAT MIGHT BE RAISED ON APPEAL AND WHY IT IS WITHOUT ARGUABLE MERIT

Did the circuit court erroneously deny Smith's petition for discharge without a full hearing?

It might be claimed on appeal or in a postcommitment motion that the circuit court erroneously denied Smith a full evidentiary hearing on his petition for discharge. However, for the following reasons any such claim would be without arguable merit.

A person committed under ch. 980 may seek to obtain a discharge hearing using the process set out in Wis. Stat. § 980.09. The process begins with the filing of a petition for discharge by the committed person. *See* Wis. Stat. § 980.09(1). If the petition does not allege "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," the circuit court is to deny the petition without a hearing. *Id.* If, on the other hand, the court determines the petition does allege the requisite facts, then the court reviews the petition and certain other documents to determine if they "contain[] facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person." *See* Wis. Stat. § 980.09(2). If the court determines this standard is met, the court is to hold a discharge hearing. *See* Wis. Stat. § 980.09(2) and (3); ***State v. Arends***, 2010 WI 46, ¶¶23-43, 325 Wis. 2d 1, 784 N.W.2d 513.

Thus, the threshold determination for the circuit court is whether a petition for discharge 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." This court recently held that the "change" in condition referred to in § 980.09(1) includes any change in the person himself or herself *and* any change in the professional knowledge and research used to evaluate a person's mental disorder or dangerousness, if the change is such that a fact-finder could conclude the person does not meet the criteria for a sexually violent person. ***State v. Ermers***, 2011 WI App 113, ¶¶1, 16, 31, ___ Wis. 2d ___, ___ N.W.2d ___.

In this case the circuit court concluded that the § 980.09(1) threshold was not satisfied by Watson's opinion that Smith does not meet the criteria for commitment. The court instead concluded that while Watson came to a different diagnosis and conclusion from previous state examiners, he did so based on the same basic evidence and information about Smith that had been present from the time of initial commitment. (190:2-4). Indeed, as the circuit court noted, Watson was saying substantially the same things that another expert said when the other expert testified on behalf of Smith at the 2009 discharge hearing: Namely, that Smith has personality disorders that make it likely he will reoffend, although the type of offenses he will commit are more likely to fall outside the narrow definition of sexually violent acts as defined for purposes of ch. 980. (190:3).

A new expert's different opinion—whether regarding diagnosis or risk or both—is not a "change" in the committed person's condition if it is based on the same evidence and information that previous experts used to reach their

(contrary) opinions. ***Ermers***, 2011 WI App 113, ¶35 ("We emphasize that the 'change' referred to in Wis. Stat. § 980.09(1) does not include an expert opinion that depends only on facts or professional knowledge or research that was considered by the experts testifying at the commitment trial.") *See also* ***State v. Kruse***, 2006 WI App 179, ¶¶35, 296 Wis. 2d 130, 722 N.W.2d 742; ***State v. Combs***, 2006 WI App 137, ¶23-32, 295 Wis. 2d 457, 720 N.W.2d 684.

Further, this case is not like ***Ermers***, in which an examiner concluded that "based on new professional knowledge and research," the committed person did not meet the standard of being "more likely that not" to commit future acts of sexual violence. *See also* ***State v. Pocan***, 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 860 (under a prior version of Wis. Stat. § 980.09, the committed person was entitled to an initial hearing on his discharge petition based on an expert opinion using actuarial tables that were unavailable at the time of initial commitment). While Watson's report cited the new norms under the Static-99, and those norms were created as the result of new knowledge and research regarding sex offender risk, that new knowledge and research was not the basis for Watson's different opinion in this case. Indeed, Watson cited the Static-99R result as proof that Smith presents a high risk to reoffend, just not in a sexually *violent* manner. (188:5).

Instead, Watson's conclusion that Smith does not meet the ch. 980 criteria were based primarily on his conclusion that Smith should not be diagnosed with any sort of Axis I sexual disorder and, therefore, that he was not more likely than not to commit a sexually *violent* offense. Again, this conclusion is based not on new information about or some change in Smith, or in some change in the diagnostic criteria that experts in these cases use; instead, it was based on the

same tools and the same evidence and information that previous examiners used. Watson just came to a conclusion that was different from that reached by previous state examiners but similar to and consistent with opinions reached by one of Smith's experts in the 2009 discharge proceeding.

Undersigned counsel does note that this case presents a disquieting anomaly. In the usual discharge petition denial, the expert doing the annual reexamination opines that the committed person still meets the criteria and another expert retained on behalf of the committed person. In this case, by contrast, the annual reexamination of Smith by a randomly assigned examiner (employed by the state though not retained by the prosecution) has concluded Smith does *not* meet the criteria. But because that examiner reached his opinion based on his application of the diagnostic and risk assessment tools that every other previous expert has used, Smith does not get a discharge hearing.

This is disquieting because the first step in the screening process has raised the prospect that Smith should no longer be committed, and yet under § 980.09 as interpreted by the courts he cannot get even an evidentiary hearing. As this court has noted, the annual re-examinations and procedures for discharge hearings are "among the protections that the supreme court has considered significant in concluding that Wis. Stat. ch. 980 does not violate the equal protection clause or the right to due process." ***Combs***, 295 Wis. 2d 457, ¶28 (citing ***State v. Post***, 197 Wis. 2d 279, 307 n.14, 313-16, 325-27, 541 N.W.2d 115 (1995)). *See also* ***State v. Rachel***, 2002 WI 81, ¶66, 254 Wis. 2d 215, 647 N.W.2d 762 (ch. 980 "passes constitutional muster" because confinement is "linked to the dangerousness of the committed person" and there are procedures for ending confinement when the person is no longer dangerous);

State v. Thiel, 2004 WI App 140, ¶23, 275 Wis. 2d 421, 685 N.W.2d 890 ("[O]ur supreme court has tied the constitutionality of Wis. Stat. ch. 980 to the availability of periodic reviews that reassess the person's dangerousness to determine if a lesser restriction of his or her liberty is warranted.").

However, the clear mandate of § 980.09(1) as interpreted by this court is that a discharge petition must be based on a "change" and not just on a different expert opinion. In light of those holdings as well as the stringent standard applied to challenges to the constitutionality of a statute, undersigned counsel concluded that there would be no arguable merit in challenging the conclusion that under § 980.09 an expert opinion like the one in this case is not by itself enough to get the committed person an evidentiary hearing.

Accordingly, for the reasons stated above, counsel believes it would be without arguable merit to claim on appeal or in a postcommitment motion that the circuit court erroneously denied Smith a full evidentiary hearing on his petition for discharge.

CONCLUSION

For the reasons stated above, counsel has concluded that any grounds which might arguably support an appeal or postcommitment motion in this matter would be frivolous and without arguable merit within the meaning of ***Anders v. California***, 386 U.S. 738 (1967), and Wis. Stat. § 809.32. Therefore, counsel respectfully requests that the court release him from further representation of John Smith in this matter.

Dated this ____ day of August, 2011.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATION IN COMPLIANCE WITH 809.32(1)(b)

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this ____ day of August, 2011.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this ___ day of August, 2011.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant