STATE OF WISCONSIN

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

DISTRICT X

Case No. XXXXAPXXXX-NM

In re the Commitment of John Smith:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JOHN SMITH,

Respondent-Appellant.

ON NOTICE OF NO MERIT APPEAL FROM A JUDGMENT ENTERED IN BAY COUNTY CIRCUIT COURT, JUDGE GROVER CLEVELAND PRESIDING

NO MERIT BRIEF OF RESPONDENT-APPELLANT

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

STATEMENT OF ISSUES THAT MIGHT ARGUABLY SUPPORT AN APPEAL

I. WERE THERE ERRORS IN THE PROCEEDINGS BEFORE OR AT TRIAL THAT DEPRIVED JOHN SMITH OF A FAIR TRIAL?

Not raised in the trial court.

II. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

Not raised in the trial court.

STATEMENT OF THE CASE AND FACTS

On March 5, 2007, the state filed a petition under Wis. Stat. § 980.02(1)(a) (2005-06) alleging that John Smith was a sexually violent person under Wis. Stat. Ch. 980. (1:1-9). On March 23, 2007, Smith appeared with counsel for the probable cause hearing. (45). Based on testimony from an employee of the Department of Corrections regarding Smith's sentence structure and release date, (45:3-8), and the testimony of Faye Dunaway, a psychologist, regarding Smith's mental disorder diagnoses and risk of reoffense, (45:9-25), the court found probable cause to hold Smith for a trial on the petition. (5:1; 45:58-60).

The state filed a request for a jury trial. (7). The court set trial dates after Smith waived the time limit for trial under Wis. Stat. § 980.05(1). (46:2, 6). At a pretrial motion hearing the parties and the court addressed and resolved all of the matters raised in Smith's motion in limine, including the use of a jury questionnaire. (14; 47).

A jury was selected after a lengthy and thorough voir dire, which included individual questioning in chambers of some potential jurors. (48:18-165). Smith

waived his right to be present during the individual voir dire. (48:3-4).

At trial the state presented three witnesses: John Watson and Amy Adams, both employees of the Department of Corrections, and Faye Dunaway, the psychologist who had evaluated Smith for commitment as he neared the end of his sentence. The witnesses testified as follows.

Watson, who was the community corrections agent assigned to Smith's case, (48:201), testified regarding Smith's prior convictions for sexually violent offenses (26:Ex. 1 and 2; 48:204-07). He also laid the foundation for the admission of Department of Corrections records regarding Smith's participation in sex offender treatment. (26:Ex. 4, 5, and 6; 48:211-20) and Smith's self-reports of his sexual offending history. (26:Ex. 7 and 8; 48:220-31).

Adams, who had written the presentence investigation for Smith's predicate offense, (49:9-10), laid the foundation for the admission of a redacted version of the presentence investigation as well as another summary of sexual misconduct that Smith had written while in treatment before he was convicted of an offense but which he turned over to Adams while she was preparing the PSI. (26:Ex. 3 and Ex. 9; 49:10-14).

To prove that Smith has a mental disorder that makes it likely that he will commit acts of sexual violence, the state relied on Dunaway, the psychologist. She opined that Smith was suffering from two mental disorders—pedophilia and borderline personality disorder with antisocial features. (26:Ex. 11 at 19-20; 49:66-83, 88-92). Smith's scores on actuarial risk assessments were low, indicating that he is not likely to reoffend. (26:Ex. 11 at 21-22; 49:105, 106, 107; 51:46, 48). However, Dunaway concluded that despite these low scores Smith had serious difficulty in controlling his behavior and was

more likely than not to commit another sexually violent offense. (26:Ex. 11 at 23; 49:94, 100). She reached this conclusion based primarily on her opinion that Smith has a high level of psychopathy and sexual deviancy, the combination of which she believes indicates a substantial risk to reoffend. (26:Ex. 11 at 22-23; 49:101-25).

In his defense Smith called psychologist April O'Neill, who conducted the evaluation that is done after a probable cause hearing results in the respondent being held for trial. (51:10-11, 71). *See* Wis. Stat. § 980.04(3). She concluded that Smith was suffering from the mental disorders of pedophilia, nonexclusive type, and personality disorder not otherwise specified. (26:Ex. 15 at 3-4; 51:25-33). However, she concluded that Smith was *not* more likely than not to engage in future acts of sexual violence. She based his conclusion on Smith's scores on the actuarial risk assessment tools, even taking account of his limited progress in and continued need for treatment. (26:Ex. 15 at 5-8; 51:48-70). She specifically concluded that it was not appropriate to find Smith met the risk criteria based on the deviance and psychopathy combination because that approach does not have the kind of solid research basis that supports the actuarial tools. (26:Ex. 15 at 6-7; 51:54-69).

Smith himself declined to testify after a colloquy with the court regarding his decision. (51:130-34).

The jury found that the state had proven all of the elements of the commitment and that Smith was a sexually violent person. (29; 52:69). Following the verdict the court entered a judgment of commitment to institutional care. (30). Smith subsequently filed notice of intent to pursue postcommitment relief, (31), and appellate counsel subsequently filed a no merit notice of appeal. (43).

Additional facts will be stated as necessary in the discussion of the issues.

ISSUES THAT COUNSEL CONSIDERED IN REVIEWING WHETHER THERE MIGHT BE GROUNDS FOR AN APPEAL AND WHY THEY ARE WITHOUT ARGUABLE MERIT

I. There is no merit to an argument that errors in the proceedings before and at trial entitle Smith to a new trial.

It might be claimed on appeal or in a postconviction motion that the defendant should be granted a new trial or his convictions vacated because of various errors before and at trial or because the evidence was insufficient to conclude Smith meets the ch. 980 criteria. However, for the following reasons such claims would be without arguable merit.

A. Proceedings before trial.

There was only one motion before the trial—Smith's motion in limine. (14). Given the nature of the issues and how they were resolved, counsel sees no basis for claiming on appeal that any error in the resolution of the motion in limine provides a basis for granting Smith a new trial.

Most of the issues raised in the motion in limine were ordinary logistical concerns that were resolved at a hearing before trial through the substantial agreement of the parties and the court. (47:4-20). The only issue out of the ordinary was Smith's request to bar the state from introducing evidence of others outside the 980 proceedings opining about Smith's risk to reoffend or his need for treatment. (14:1-2). The attorneys had discussed the request but it was left unresolved at the hearing, as Smith's attorney said that, based on his discussions with the prosecutor, he would "either amend that or withdraw it." (47:4-5).

To properly preserve an issue for appeal, the issue must be brought to the trial court's attention in a manner that focuses on the issue. *See* ***Zeller v. Northrup King Co.***, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985); ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). A claim is deemed abandoned if a party fails to offer argument or evidence to support it. ***Santiago v. Ware***, 205 Wis. 2d 295, 312 n.10, 556 N.W.2d 356 (Ct. App. 1996). The record does not indicate that the request was pursued or renewed during the trial. Thus, the claim that such evidence should be barred was abandoned.

Furthermore, even if the request should have been granted, counsel's review of the record did not discover any evidence admitted that would have been barred under Smith's request. Accordingly, there is no basis to allege that the request should have been pursued so that it would have barred inappropriate evidence.

B. Trial proceedings.

In counsel's view there were three objections or events at trial that raise an issue that might provide an arguable basis for an appeal. These issues, and why they do not provide a basis for appeal, are as follows.

The first issue involves the admission of Exhibit 3, which is the presentence investigation prepared at the time Smith was sentenced for the predicate offense. (26:Ex. 3; 28:Ex. 1; 48:207; 49:9). Both of the experts in the case reviewed the PSI and relied on information in it to reach their conclusions. (26:Ex. 11 at 2, Ex. 15 at 1; 49:31). Smith's attorney initially objected to multiple instances of hearsay within the document and to the probative value of some of the material being outweighed by its prejudicial effect, and noted that the experts' reliance on inadmissible information did not make the information admissible. (49:29, 31-32). The state outlined some of the information that it did not intend to introduce,

but argued that the document was relied on by the experts and so should be admissible and referred to as part of the examinations of the experts, but then redacted to remove the inadmissible information should the jury ask to review the exhibit. (49:30-31, 32-34).

As the circuit court correctly pointed out, an expert may use inadmissible evidence to form an opinion, but the expert's use of the information does not make otherwise inadmissible evidence into admissible evidence. (49:36-38). *See* Wis. Stat. § 907.03; ***State v. Watson***, 227 Wis. 2d 167, 198-99, 595 N.W. 2d 403 (1999). The mere fact an expert relied on the information does not end the inquiry. Instead, it must be determined whether the information is admissible or inadmissible under another applicable rule of evidence.

It is true that documents prepared by DOC (like a presentence investigation) may in some cases be admissible under the hearsay exception for public records. *See* Wis. Stat. § 908.03(8). As this court observed in ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997):

> Probation and parole files compiled by the DOC fall within the definition of public records, an exception to hearsay under § 908.03(8), Stats. Moreover, since ch. 980 is a civil proceeding, the records may be used to establish factual findings made during investigations, as well as activities or observations made by DOC personnel.

Thus, information in Exhibit 3 that constitutes factual findings made during investigations or activities or observations made by DOC personnel would be admissible.

However, while PSIs commonly include statements from the victim and other people who know or are familiar with the defendant, such statements are neither "matters observed pursuant to a duty imposed by

law" nor "factual findings resulting from an investigation made pursuant to an authority granted by law." Thus, Exhibit 3's reiterations of the statements of non-DOC personnel would not fit under the public records hearsay exception, though they might fit under another one. And it was the Exhibit's reiterations of the statements of others—especially their statements of belief about his risk to reoffend—that was the focus of the objection. (49:29, 32).

Ultimately, however, the parties and the court did not parse out what information contained in the Exhibit was admissible and what information was not. Instead, the parties resolved the issue by agreeing to a redacted version of the PSI being admitted. (49:84-87). Though the redacted version included some arguably inadmissible hearsay statements, Smith's attorney conceded that the state would simply present that evidence directly (by calling the declarant as a witness) and therefore concluded that it was better to allow the evidence in through Exhibit 3 instead. (49:84-85). Counsel believes that it was obviously reasonable for Smith's trial attorney to take this approach, and by agreeing to the admission of the Exhibit, Smith waived any objection on appeal. ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985).

The second issue involves one area of the prosecutor's questioning of Smith's expert. Specifically, at the end of the prosecutor's cross-examination (51:122-23), the following exchange took place:

> Q. There aren't any controls in terms of supervision to prevent [Smith] from access to children, are there?
>
> A. No, there are not.

***

> Q. Mr. Smith is under no obligation at this point without commitment to seek or receive sex offender treatment in the community?
>
> A. That's correct.
>
> Q. There is nothing to keep him from dating women who have children somewhere the age [*sic*] whether it's age 4, 6, 10 or 13?
>
> A. Yes, you're right.
>
> Q. There is nothing to stop him from baby-sitting children?
>
> A. Right.
>
> Q. Or meeting kids at the mall?
>
> A. I think you have made your point.

The prosecutor's questions were arguably improper. The issue in a ch. 980 proceeding is whether the person has a mental disorder that makes it likely he will engage in acts of sexual violence. Thus, whether Smith would be on any type of supervision if he was not committed—or the conditions of that supervision—is irrelevant. ***State v. Mark***, 2006 WI 78, 292 Wis. 2d 1, ¶¶ 35-41, 718 N.W.2d 90.

While the prosecutor's questions were improper, counsel concluded that they do not provide a basis for a request for a new trial. First, Smith did not object to the questions, so the error is waived. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Further, any error in allowing the questions is harmless given that the evidence at trial supports the verdict (as discussed below, in Section II). ***State v. Harvey***, 2002 WI 93, ¶44, 254 Wis. 2d 442, 647 N.W.2d 189 (an error is harmless if it appears beyond a reasonable doubt that the error complained of not contribute to the verdict obtained). Finally, while trial counsel's failure to object to the prosecutor's questions might be raised under an ineffective assistance of counsel claim, the fact that the erroneous questions were harmless also means that any

error by counsel in failing to object was not prejudicial. *See* ***State v. Weed***, 2003 WI 85, ¶35, 263 Wis. 2d 434, 666 N.W.2d 485. Therefore, bringing a postcommitment motion or appeal on the basis of ineffective assistance of counsel for failure to object to the questions would also be without arguable merit.

The third issue is the trial court's modification of the standard jury instruction. At the state's request, the trial court included language in Wis. J.I.-Criminal 2502 informing the jury that "you need not be unanimous as to which mental disorder, if any, exists." (49:205-09; 52:55). The state asked for this language to be included based on this court's decision in ***State v. Pletz***, 2001 WI App 221, 239 Wis. 2d 49, ¶¶18-19, 619 N.W.2d 97. The trial court included the language over Smith's objection (49:205-09; 52:55, 65-66).

The trial court's instructions do not have to conform to the standard jury instructions. ***State v. Camacho,*** 176 Wis. 2d 860, 883, 501 N.W.2d 380, 389 (1993). Instead, the trial court has broad discretion in instructing a jury, but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). A jury instruction is appropriate unless the court is persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury. ***State v. Pettit***, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992). *See also* ***State v. Groth***, 2002 WI App 299, 258 Wis. 2d 889, ¶¶8-9, 655 N.W.2d 163.

As Smith's trial attorney acknowledged, the language added by the court is an accurate statement of the law. Further, given the experts' differences in opinion regarding diagnoses, the language would assist the jury in its deliberations by forestalling a question about unanimity that would have been answered by giving the jury the same information. (49:206). Because the modification to the instruction fully and fairly informed

the jury of the law regarding unanimity about mental disorder, it would be without arguable merit that the trial court erred by including the language in the instruction.

In short, for the reasons given above, counsel believes there would be no arguable merit to claim in a postcommitment motion or on appeal that Smith is entitled to a new trial based on errors in the conduct of the trial.

II. There is no merit to an argument that the evidence was insufficient to support the jury's verdict.

Any argument that the evidence was insufficient would be without arguable merit because the state presented sufficient evidence that Smith was a sexually violent person.

The test to be applied on appeal is whether the evidence was so lacking in probative value and force that it could be said as a matter of law that no trier of fact acting reasonably could have found the respondent to be a sexually violent person beyond a reasonable doubt. *See* Wis. Stat. § 980.05(3)(a); ***State v. Treadway***, 2002 WI App 195, 257 Wis. 2d 467, ¶33, 651 N.W.2d 334.

The first element of the state's case—the prior conviction for a sexually violent offense—was not contested by Smith. (48:204-07). To prove the element the state, without objection from Smith, introduced a certified judgment of conviction showing Smith was convicted of second degree sexual assault of a child. (26:Ex. 2; 48:205-06). Smith did not object to the court taking notice that the offense met the definition of a sexually violent offense. (48:206-07).

The second element—whether Smith had a mental disorder—was evidenced by the testimony of the experts for both the state and the defense that Smith has

pedophilia and a personality disorder. (49:66-83, 88-92; 51:25-33). Further, at the outset of the trial Smith's counsel implicitly conceded that Smith has a mental disorder, as he referred to the fact that O'Neill would be testifying about the same diagnoses as Dunaway and that the reason why the jury was there at all was the disagreement about risk assessment, not diagnoses. (48:189).

The remaining element was whether Smith's mental disorder made it more likely than not that he would engage in future acts of sexual violence. The state's expert concluded it did. (49:94, 100). Following what is now standard practice in ch. 980 cases, she applied the actuarial tools for risk assessment that were developed in large part for forensic use in sexually violent person commitment proceedings—tools the expert called "the best thing we've found so far in this field" because they are "sophisticated," "validated and cross-validated" and "state-of-the-art for assessing risk" that "accurately estimate" risk (49:102)—though she then went on to criticize the tools, saying they "grossly underestimate what's really going on." (49:103).

Smith's scores on the actuarial tools correlated him to groups of persons showing a *low* risk of reoffending—*e.g.*, 21% over ten years, 16% over 15 years, 8% over six years. (49:105, 106, 107; 51:46, 48). So the state's expert instead looked to other factors that in her judgment showed that Smith was high risk. In particular, she emphasized her belief that Smith had something she dubbed the "dynamic duo," (49:118) — the combination of sexual deviance (based on the pedophilia diagnosis) and psychopathy (based on her scoring of Smith on a popular checklist developed to do clinical assessments for psychopathy (49:181)). She then pointed to studies showing pronounced risk for people with the "dynamic duo" — specifically, from 50 to 82% over five-to-seventeen year periods, depending on the study. (49:108-19, 123-25). Indeed, in her view this combination made

the actuarial tools "irrelevant" to Smith. (49:110). She also found no factors that mitigated his risk. (49:119-20).

After explaining the theoretical basis for the actuarial tools and noting that they are better than relying on clinical judgment, (51:33-42), Smith's expert also characterized them as "the best tool we have." (51:34). He told the jury that besides doing a good job of separating low-risk from high-risk offenders, the actuarial tools "keep us honest" because "[i]f I am left to my own devices, I am sure I can conjure up all sorts of reasons why somebody is going to reoffend and why they are not likely to reoffend." (51:34). Consistent with his view of the value of actuarial tools in risk assessment, and in contrast to the state's expert, he put stock in Smith's low actuarial scores and concluded that Smith was not dangerous, even if one accepted that the tools underestimate risk and, based on that assumption, doubled the tools' risk estimates. (51:48-49, 70).

Smith's expert also considered other factors bearing on risk. He noted that Smith had not completed sex offender treatment, though he could not come to a conclusion about whether his participation was meaningful enough to have affected risk. (51:50-53). He looked at whether Smith exhibits psychopathy to the extent that it might increase risk, but, unlike the state's expert, he concluded Smith did not exhibit psychopathy because he gave Smith a lower score on the same psychopathy checklist the state's expert used. (51:54-55, 60-61). He further testified that he did not put as much trust in the deviance and psychopathy combination as he did in the actuarial tools. (51:67). The paucity of studies and limited numbers of persons in the studies dealing with that combination led him to conclude that the approach "doesn't have a research basis[,] so we don't know whether it's reliable" and that the handful of studies on that combination does not trump the dozens of studies supporting the actuarial tools. (51:68-69).

Both experts were subject to lengthy cross-examination. Smith's cross-examination of the state's expert focused on the sounder research basis for the actuarial tools as opposed to the "dynamic duo," exposed the clinical judgment involved in determining psychopathy, and brought out inconsistencies or flaws in her methodology in applying the various tools and assessment methods. (49:156-190; 50:20-39, 61, 63-65).

The state's examination of Smith's expert focused on Smith's history of offending and the limits of the actuarial tools, in particular that the tools underestimate risk to some unknown degree, that a score on the tools does not tell us the risk for any specific person but only compares the person to a group of known offenders, and that the actuarial tools were not developed to measure specifically the rate of recidivism of offenders with pedophilia. (51:73-85, 110-13, 117-22). Smith's expert forthrightly acknowledged the difficulty he had with the case, as there were data pointing both to high risk and low risk. (51:76-77). And he acknowledged Smith's past conduct showed a predisposition to engage in sexual activity with children, but he could not conclude that he was more likely than not to continue that activity in the future. (51:73, 98-106).

Clearly, the issue in this case came down to whether Smith was more likely than not to reoffend. The experts came to opposite conclusions, and the bases for their opposing conclusions were thoroughly examined and cross-examined. It is a bit of a curiosity to see the state's expert conclude that the most sophisticated and best available tools for risk assessment — the very tools so heavily relied on by the state in the mine-run ch. 980 case — are irrelevant. However, the ultimate weight to give the factors relevant to risk, as well as the expert testimony, rests with the jury as the trier of fact. ***State v. Kienitz***, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). Thus, despite the contrary conclusions of the experts, the jury had the right to accept the testimony and reasoning of

the state's expert and find that Smith was dangerous to others because his disorder made it more likely than not that he would engage in acts of sexual violence.

In addition, the jury could have disregarded *both* experts and come to its own conclusion about risk based solely on Smith's history of offending, for the jury is not bound by medical labels, definitions and opinions, and there is no requirement that the jury base its decision on expert testimony. (52:52, 55). *Cf.* ***Kienitz***, 227 Wis. 2d at 439-40 (declining to decide whether expert testimony regarding risk is required as a matter of law in a ch. 980 case). The state's argument in this case did seem to come down to the simple proposition that a person's past behavior is the best predictor of his future behavior. That is because Smith's pedophilia and personality disorder were diagnosed based on his history. Pedophilia shows sexual deviance and personality disorder shows psychopathy. Thus, Smith's history shows he has psychopathy and deviancy, and those together indicate high risk. Put more directly, Smith's history indicates a high risk to reoffend: He did it before, so he'll more than likely do it again.

Indeed, the state at points explicitly argued that Smith's past being the best predictor of his future was a "common sense" or "intuitively obvious" proposition, though Smith pointed out that the research done for the actuarial tools sometimes contradicted intuition or common sense and that the proposition makes all of the expert testimony superfluous, if not irrelevant. (49:119; 50:15-16, 63-64; 52:9-11, 19, 25, 29-30, 45, 52). Viewed from the perspective of this argument, the case may have been over when the exhibit summarizing the offense histories Smith himself wrote, (26:Ex. 8), was published to the jury, before the state's expert took the stand to dress up the historical facts of Smith's life with psychological concepts that the jury could well have ignored. It is perhaps yet another curiosity that a system that has expended considerable effort and resources to

developing a science-based method of diagnosis and risk assessment can essentially cast that effort aside by allowing the jury to decide the case on the proposition that Smith sexually assaulted children before, so he'll do it again. Nevertheless, counsel is not aware of any legal basis for claiming on appeal that a jury could not decide the case on this basis.

In short, the jury had before it evidence from which it could conclude that Smith has a mental disorder that makes it more likely than not he will commit sexually violent offenses in the future. Thus, any argument that the evidence was insufficient to support the verdict would be without arguable merit.

CONCLUSION

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

Dated this 28th day of May, 2009.

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 28th day of May, 2009.

Signed:

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[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant