LITIGATING 980 APPEALS

CHAPTER 980 APPEALS: Some basics

1. Rule 809.30 versus civil rules

Chapter 980 appeals are now generally governed by Rule 809.30, rather than the rules governing civil appeals. Consequently, if appellate counsel wishes to raise a claim of ineffective counsel, newly discovered evidence or some other unpreserved issue, counsel can file a motion for new trial under Rule 809.30(2)(h), without having to first secure a remand from the court of appeals.

2. Ineffective counsel claims.

Given the limited Chapter 980 case law and the evolving legal standards under this Chapter, it remains difficult to allege that trial counsel's performance in a particular case was deficient as a matter of law. Wisconsin appellate courts have repeatedly declared that trial counsel's act or omission will not support a claim of ineffective counsel if, at the time, the underlying legal principle is unclear, not yet "settled," or "obscure." ***State v. Van Buren***, 2008 WI App 26, ¶ 18-19, 307 Wis. 2d 447, 460-461, 746 N.W.2d 545; ***State v. Wery***, 2007 WI App 169, ¶ 17, 304 Wis. 2d 355, 367-368, 737 N.W.2d 66; ***State v. Thayer***, 2001 WI App 51, ¶ 14, 241 Wis. 2d 417, 428, 626 N.W.2d 811; ***State v. Hubert***, 181 Wis. 2d 333, 341, 510 N.W.2d 799 (Ct. App. 1993). The government's continued efforts to rigidly enforce waiver rules and restrict the scope of interests of justice review may compel the filing of more ineffective counsel claims in 980 cases.

3. Interests of justice review.

When a potential appellate issue is not preserved for review, appellate counsel should consider alternatively seeking a new trial in the interests of justice.

A. Pursuant to Wis. Stat. § 752.35, an appellate court has the independent authority to grant a new trial in the interests of justice when the real controversy has not been fully tried. ***State v. Williams***, 2006 WI App 212, ¶ 12, 296 Wis. 2d 834, 845, 723 N.W.2d 719. This may occur when "the jury had before it evidence not properly admitted which so clouded the crucial issue that it may be fairly said that the real controversy was not fully tried, " or when

the jury was not "given the opportunity to hear important testimony that bore on an important issue in the case." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985).

B. To order a new trial because the real controversy was not fully tried an appellate court "need not determine that a new trial would likely result in a different outcome." ***State v. Williams***, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 858, 723 N.W.2d 719. *See also*, ***State v. Watkins***, 2002 WI 101, ¶¶ 97, 98, 255 Wis. 2d 265, 309, 310, 647 N.W.2d 244 ("In this case it is far from clear whether a new trial will result in a different verdict, or in precisely the same verdict previously rendered); ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985)(A new trial may be ordered under the real controversy prong of the court's discretionary reversal authority "without finding the probability of a different result on retrial when it concludes that the real controversy has not been fully tried."). Application of a more demanding prejudice analysis to claims raised under the alternative miscarriage of justice standard is understandable inasmuch as the substance of the new trial in such a case will presumably not be any different than the original trial.

C. A trial court also has the authority to order a new trial in the interests of justice. ***See***, ***State v. Harp***, 161 Wis. 2d 773, 779, 782, 469 N.W.2d 210 (Ct. App. 1991); ***State v. Lamont D.***, 2005 WI App 264, ¶ 11, 288 Wis. 2d 485, 494, 709 N.W.2d 879. Significantly, if a trial court exercises its discretionary authority to order a new trial in the interests of justice, a reviewing court will apply a deferential standard of review and uphold the trial court's decision absent a clear showing of an erroneous exercise of discretion. ***Krolikowski v. Chicago & N.W. Trans. Co***., 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). ***See also***, ***Sievert v. American Fam. Mut. Ins. Co***., 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct.App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995)("This court owes great deference to a court's decision granting a new trial."); ***State v. Lamont D.***, 2005 WI App 264, ¶ 11, 288 Wis. 2d 485, 494, 709 N.W.2d 879 ("We accord 'great deference' to the trial court's exercise of discretion" because "the trial court is in the best position to observe and evaluate evidence."); ***Krolikowski***, 89 Wis. 2d at 581, *quoting* ***Bartell v.***

D. In ***State v. Williams***, 2006 WI App 212, ¶¶ 14-17, 296 Wis. 2d 834, 846-847, 723 N.W.2d 719, the Court of Appeals rejected the government's contention that a reviewing court lacks the authority to order a new trial because the real controversy was not fully tried when defendant could have sought relief under an ineffective counsel rationale. **BEWARE**: As part of its ongoing effort to restrict the scope of interests of justice review, the Attorney General has been seeking Supreme Court review of the decision in ***Williams***. *See*, ***State v. Henley***, 2010 WI 97, ___ Wis. 2d ___, ___ N.W.2d ___, (Reversing a trial court's grant of a new trial in the interests of justice concluding the trial court's interests of justice authority does not extend to a request for relief brought under Wis. Stat. § 974.06).

E. Some typical government responses designed to restrict consideration of a request for a new trial in the interests of justice.

1. The government usually opens its opposing argument by quoting case law declaring that a reviewing court's discretionary reversal authority should "be exercised sparingly and with great caution." ***State v. Watkins***, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244 ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. Through a selective citation of cases,[1] the State will then seek to imply that the authority to order a new trial in the interests of justice does not extend to evidentiary blunders, but rather, is limited to those rare circumstances where a faulty jury instruction, the unavailability of DNA

[1] For instance, ***State v. Armstrong***, 2005 WI 119, 283 Wis.2d 639, 700 N.W.2d 98; ***State v. Peters***, 2002 WI App 243, 258 N.W.2d 148, 653 N.W.2d 300; ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996); and ***State v. Ambuehl***, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988).

evidence, or some other major error either nullified an available defense or completely deprived the jury of evidence dispositive of guilt or innocence.

2. Contrary to the narrow characterization of interests of justice review noted above, the type of circumstances that may warrant a new trial because a case was not "fully tried" include situations where an evidentiary error or improper argument compromises the jury's ability to fairly resolve a credibility dispute. ***For example, see State v. Cuyler,*** 110 Wis. 2d 133, 141-143, 327 N.W.2d 662 (1983)(New trial ordered in the interests of justice when defendant was not afforded a full trial on the issue of credibility because the defense was not permitted to offer opinion testimony addressing defendant's character for truthfulness); ***State v. Penigar***, 139 Wis. 2d 569, 572, 578, 408 N.W.2d 28 (1987)(New trial ordered in the interests of justice because testimony improperly declaring that complainant had never previously had sexual intercourse so clouded the issue of consent in a sexual assault prosecution that it prevented the real controversy from being fully tried); ***State v. Romero***, 147 Wis. 2d 264, 277-279, 432 N.W.2d 899 (1988)(New trial ordered in the interests of justice because comments on complainant's truthfulness clouded consideration of the central credibility issue); ***State v. Neuser***, 191 Wis. 2d 131, 137-141, 528 N.W.2d 49 (Ct. App. 1995), (New trial ordered in the interests of justice because the prosecutor's closing remarks misleadingly commenting on the process for submitting lesser included offenses introduced an improper consideration into the jury's deliberations).

3. Be forewarned that the government's position on the permissible scope of interests of justice review is likely to depend on the nature of the concern raised in the particular case. In ***State v. Harp***, 161 Wis. 2d 773, 469 N.W.2d 210 (Ct. App. 1991), a case involving a defect in the substantive jury instructions, the government took essentially the opposite position in seeking to restrict a trial court's authority to order

ORIGINAL COMMITMENT PROCEEDINGS: SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR AND JURY INSTRUCTION 2502

1. In ***State of Wisconsin v. Jesse Williams***, 2010AP781, which is currently pending before District IV of the Court of Appeals, the petitioner is arguing that Jury Instruction 2502 does not properly instruct the jury concerning how to consider whether the petitioner has serious difficulty controlling behavior. In ***Kansas v. Crane***, 534 U.S. 407, 413 (2002), the United States Supreme Court held that commitment as a sexually violent person required "proof of serious difficulty controlling behavior" that was sufficient to "distinguish the dangerous sexual offender whose serious mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."

    A. After the decision in ***Crane***, the Criminal Jury Instruction Committee changed WIS JI-CRIM 2502 to include a reference to "serious difficulty in controlling behavior." In ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, however, the Wisconsin Supreme Court held that there need not be a "separate finding" on difficulty in controlling behavior and that Chapter 980 satisfies the requirement for proof of lack of control because it requires a nexus between the person's mental disorder and dangerousness. Despite ***Laxton,*** the Criminal Jury Instruction Committee did not change the pattern jury instruction to remove the reference. The Committee explained its decision not to change the instruction by noting that "it is prudent to make explicit what is implicit in the statutory standard." WIS JI-CRIM 2502 n.8 (2007), at 10.

    B. Even if a jury need not be instructed on a particular matter, if a jury is instructed on that matter, the instruction must fully and fairly inform the jury of the applicable rules of law. ***State v. Dix***,

i. it makes internally inconsistent statements about "mental disorder" in that the penultimate sentence, which says that *not* all persons who have a mental disorder are "predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior" contradicts the first sentence which indicates that a person *cannot* have a mental disorder *unless* they are predisposed to commit such offenses and *unless* they have difficulty controlling behavior.

ii. it fails to make clear enough that a person's offense history is not, by itself, sufficient to find a "mental disorder." Unless there is more than one offense introduced into evidence, juries are not told that evidence of other sexual offenses "alone is not sufficient" to establish a mental disorder.

iii. it fails to explain the need to find more than a diagnosis from the DSM-IV-TR (or similar manuals) to meet the definition of "mental disorder."

2. The case proposes replacing the current language with:

> 2. That (name) has a mental disorder.
>
> "Mental disorder" means a conditions affecting a person's emotional or volitional capacity that predisposes the person to engage in acts of sexual violence to such a degree that it causes the person serious difficulty in controlling (his) (her) behavior.
>
> Evidence has been submitted that (name) has committed one or more sexually violent offenses. This evidence alone is not sufficient to establish that (name) has amental disorder. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. Further, not every person who has engaged in one or more sexually violent offenses in the past has a condition affecting (his) (her) emotional or volitional capacity, a predisposition to engage in acts of sexual violence, or serious difficulty in controlling (his) (her) behavior.

> You are not bound by medical, psychological, or other expert opinions, labels, or definitions. Before you may find that (name) has a mental disorder, you must be satisfied beyond a reasonable doubt from all of the evidence in the case that (he) (she) has a condition that causes (him) (her) to have serious difficulty in controlling behavior to a degree that distinguishes (him) (her) from ordinary offenders who are likely to commit new crimes.

DISCHARGE PROCEEDINGS: SURVIVING THE TWO-STEP SCREENING PROCESS TO SECURE A HEARING

1. In ***State v. Arends***, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513, the Wisconsin Supreme Court ruled that when a 980 patient petitions for discharge under 980.09, a trial court engages in a two step screening process to determine whether to even hold a discharge hearing.

   A. Under the first step of the screening process, the trial court conducts a paper review limited to the petition and its attachments to determine whether sufficient facts have been alleged that could support a finding the patient does not meet the criteria for commitment.

> Under § 980.09(1), the circuit court engages in a paper review of the petition only, including its attachments, to determine whether it alleges facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. This review is a limited one aimed at assessing the sufficiency of the allegations in the petition. If the petition does allege sufficient facts, the circuit court proceeds to a review under § 980.09(2).

State v. Arends, 2010 WI 46, ¶¶ 4, 23-30, 325 Wis. 2d 1, 3, 13-16, 784 N.W.2d 513. "Conclusory allegations alone are not enough." ***Id.***, at 14, ¶ 25. If the petition (including attachments) does not allege sufficient facts, "the court must deny the petition." ***Id.***, at 15-16, ¶30. If the petition is sufficient, the patient must then survive the second screening phase. In a footnote, the Court indicated it was confident the paper review of § 980.09(1) was satisfied, because the attached expert's report concludes the patient is no longer likely to reoffend. ***Id.***, at 22-23, n. 24.

B. Applying the "second level of review" set forth in § 980.09(2), the trial court must determine whether it has been presented with "facts from which a reasonable trier of fact could conclude the patient does not meet the criteria for commitment."

> The circuit court's task is to determine whether the petition and the additional supporting materials before the court contain any facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person.

State v. Arends, 2010 WI 46, ¶¶ 5, 37, 43, 49, 53, 325 Wis. 2d 1, 4, 18, 21, 23, 24, 784 N.W.2d 513. "[R]eview here is a limited one," assessing whether "the record in toto" contains "facts that could support relief." ***Id***., at 19, ¶ 38. In making this determination the trial court is required to examine not only the pleadings, but past re-examination reports, the State's written response, the arguments of counsel and any supporting documentation provided by the parties. ***Id.***, at 16-17, ¶¶ 32-33. The court is not, however, required to "take every document a party submits at face value." While the trial court does not weigh conflicting evidence, it can essentially disregard allegations not founded on facts upon which a finder of fact could reasonably rely. ***Id.***, at 19-20, ¶ 39-40.

C. ***Arends*** rejected the State's contention that in order to obtain a discharge hearing the 980 patient must allege a change in his condition. ***Id.***, at 20, ¶ 41.

> We also reject the notion that the burden shifts to the petitioner to prove he or she "no longer meets" the criteria for commitment. The statute focuses on whether a trier of fact could conclude that the petitioner "does not meet the criteria for commitment." The petitioner does not need to prove a change in status in order to be entitled to a discharge hearing; the petitioner need only provide evidence that he or she does not meet the requirements for commitment.

Id., at 20, ¶ 41. (**CAUTION**: See footnote 21, asserting prior rulings would not be altered under the new statutory standards).

D. In ***Arends***, the trial court's denial of a discharge trial was deemed improper under § 980.08(2), because the trial court did not consider past reexamination reports and had erroneously applied the old "probable cause" standard. The remedy was a remand to the trial court for a new screening decision.

2. In ***State v. Allison***, 2010 WI App 103, ___ Wis. 2d ___, ___ N.W.2d ___ , the Court effectively concluded that no matter how unfavorable the evidence may be to the government's position, the government is entitled to a jury or court trial before a 980 patient may be discharged. The Court overturned a trial court order granting summary judgment on the issue of discharge even though the examining physicians, including the government's examiner, concluded the patient did not satisfy the criteria for commitment. Concluding a trial judge does not have the authority to grant summary judgment in a discharge proceeding under § 980.09, the Court reasoned that summary judgment is unavailable in this context because § 980.09(2) "explicitly prescribes a different procedure." ***Id***, at ¶ 17. Apparently, by specifying that the court "shall" set the matter for a hearing if the petitioner raises a factual basis for discharge, the legislature precluded other options such as summary judgment. ***Id.***, at ¶ 18. The Court notes that no one can say with certainty what might come up when the State is given an opportunity to cross-examine witnesses at trial. ***Id***., at ¶ 20. A petition for review is pending in ***Allison***.

3. PRACTICAL CONCERNS IN § 980.09 DISCHARGE PROCEEDINGS.

A. How do you safeguard the client's ability to survive the first stage of paper review when the standardized petition forms provided to the patient at the Institution are arguably inadequate to satisfy the requisite pleading standard?

B. Can the patient secure the assistance of counsel to assist in the preparation of the petition?

C. Should counsel draft and file an amended petition when the patient's pleading is deficient?

D. Can the patient or counsel secure an independent evaluation report to attach to the petition for the initial paper review under § 980.09(1)?

E. What new information or change in circumstances must be alleged to successfully advance to a discharge hearing?

F. **BEWARE:** Troubled by the recent discharge of patients without any support or treatment services, some 980 examiners may attempt to include in their annual exam report a clinical opinion that (notwithstanding the fact the patient does not now satisfy the standard for 980 commitment) releasing the patient to the streets would be detrimental to the patient's welfare. Counsel should consider moving to strike any such opinion from the annual report as irrelevant.

G. BEWARE: The decision in *Allison* may cause trial counsel to face a difficult strategic choice at the close of the state's case if trial counsel believes the evidence insufficient for the state to meet its burden of proof. In such circumstances, trial counsel should move for a directed verdict against the state. Whether a motion for a directed verdict is available under Wisconsin Statutes § 805.14 or just as a matter of practice, *cf. State v. Kelley*, 107 Wis. 2d 540; 319 N.W.2d 869 (1982) (discussing the standard of review for a motion to dismiss in a criminal case at the close of the state's case), trial counsel should make such a motion. The problem arises when counsel must decide whether to present evidence on the client's behalf. If counsel presents no evidence, then the standard of review on appeal for his motion to dismiss will be whether the evidence the state presented, taken in the light most favorable to the state, is sufficient to establish that the petitioner continues to meet the criteria for commitment. *See id*. If counsel presents any evidence on the petitioner's behalf (and then moves again, as counsel must, for a directed verdict), then the standard of review on appeal for his motion to dismiss will be whether any of the evidence presented, taken in the light most favorable to the state, is sufficient. *See id*. The danger is that something or a portion of something that the petitioner's expert or other witnesses say may on direct or on cross-examination provide the basis for continued commitment.

SUPERVISED RELEASE: THE COURT AS LEGISLATURE.

State v. Rachel, 2010 WI App 60, 324 Wis. 2d 441, 782 N.W.2d 443

Notwithstanding the revised supervised release statute's silence on the issue, not only has the burden of persuasion been shifted to the patient in a supervised release proceeding under § 980.08, the patient must satisfy this burden by clear and convincing evidence. Curiously, within days following the release of this decision, Rachel was discharged from his 980 commitment, and thus, did not have an opportunity to seek further review of this ruling. A petition for review is pending in ***State v. Edwin West***, District I Case No. 2009AP001579, challenging whether the burden of proof was improperly shifted to the patient. In addition, it is anticipated that a petition to bypass will be filed in a pending appeal in ***State v. Nordberg***, challenging both the assignment of, and the degree of the burden placed on the patient.

C. The Court rejected Rachel's contention that the legislature's removal of the burden of persuasion from the State did not necessarily demonstrate its intent to silently shift this burden to the committed person. Rachel pointed out that if the legislature had actually intended to place an affirmative burden of persuasion on the patient, it could have easily expressed this intent in the plain language of the statute. Rachel further argued that much like the function a trial court performs at sentencing or at the dispositional phase of a termination of parental rights proceeding, the revised statute merely placed decision-making responsibility in the hands of the circuit court guided by a list of statutory factors. The Court disagreed.

D. Perhaps even more troubling is the ***Rachel*** Court's willingness, notwithstanding the legislature's silence, to forego the usual preponderance standard and require the patient to prove his entitlement to discharge by clear and convincing evidence. Imposing a clear and convincing burden on the committed person effectively turns ***Addington v. Texas***, 441 U.S. 418 (1971), on its head, transferring the risk of a faulty decision to the person who is the subject of the commitment. In ***Addington***, the Supreme Court concluded that in order to establish the requisite grounds for a commitment due process requires the government to satisfy the

> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

Addington v. Texas, 441 U.S. at 427.

E. In support of its conclusion that public policy necessitates placing a more demanding burden on the patient, ***Rachel*** quotes ***State v. Carpenter***, 197 Wis. 2d 252, 541 N.W.2d 105 (1995), wherein the Court upheld the constitutionality of Chapter 980. Interestingly, however, when ***Carpenter*** was decided the burden was still on the state to prove a patient should not be granted supervised release.

ELEVATING THE ROLE OF THE TRIAL JUDGE FROM POTTED PLANT TO EVIDENTIARY GATEKEEPER.

1. Some procedural basics.

A. A contemporaneous objection, and where applicable, an offer of proof, is necessary to preserve an evidentiary issue for review.

B. The best way to make a record and secure thoughtful consideration of an anticipated evidentiary claim is to present the issue in a motion in limine prior to trial. While appropriate objections should obviously be made during the trial as well, if you defer consideration of a novel or complicated evidentiary issue until the middle of the trial, the judge is less likely to meaningfully entertain the issue.

C. Inasmuch as Wisconsin is neither a ***Frye*** nor a ***Daubert*** state, if you wish to exclude a particular line of expert testimony you will need to

2. Calling upon the trial judge to restrict unreliable expert testimony: Surely there must be a limit somewhere.

A. Wis. Stat. § 907.03 permits experts to rely on facts or data that need not be independently admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Surely there must be some point at which an expert's reliance upon a particular study, actuarial instrument, data summary or hearsay report is unreasonable. In addition to raising potential relevancy and 904.03 objections, counsel should consider whether there are grounds to seek exclusion of an expert's opinion, or at least a line of the expert's testimony, on the foundational grounds that the expert's reliance upon particular information is unreasonable. For example:

1. When the author of the RRASOR indicates that examiners should no longer use this instrument because its statistical underpinnings are obsolete, isn't it unreasonable for an expert to rely on this instrument in formulating an opinion? In addition, the obsolete underpinnings make a strong basis for an argument that the results, especially the percentage results, are more unfairly prejudicial than probative and should be excluded under 904.03.

2. At some point, when a majority of examiners no longer utilize the MnSost-R due to concerns about its reliability, does it become unreasonable for an examiner to continue to utilize this instrument in assessing a patient's risk to reoffend?

3. At some point, are hearsay allegations contained in a PSI report, police report, or some other record so layered and unreliable that an expert's reliance upon this information in formulating a diagnosis or opinion on dangerousness unreasonable?

B. Another example of the general reluctance to exclude evidence offered by the government in a 980 trial, is ***State v. Kaminski***, 2009 WI App 175, 322 Wis. 2d 642, 777 N.W.2d 654. In ***Kaminski***, the Court of Appeals upheld the admission of testimony reporting a sexual assault allegation that an ALJ had previously found not sufficiently credible to satisfy the preponderance of the evidence standard for revocation. In a criminal prosecution, evidence alleging the accused engaged in prior misconduct must satisfy a minimal level of reliability. Evidence of other misconduct is not sufficiently relevant or material unless "a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." ***State v. Gray***, 225 Wis.2d 39, 59, 590 N.W.2d 918 (1999). The ***Kaminski*** Court declined to extend the due process principle of ***Gray*** to 980 trials, emphasizing the government's competing interest in confining and treating dangerous sex offenders. Interestingly, shortly before this decision was released Kaminski was discharged from his commitment. Consequently, there was no petition for review filed.

C. Seeking the exclusion of evidence based on competing constitutional and statutory interests

1. The exclusion of evidence and derivative expert opinions based on compelled statements obtained in violation of the patient's Fifth Amendment privilege against self-incrimination. ***State v. Harrell***, 2008 WI App 37, 308 Wis. 2d 166, 747 N.W.2d 770; ***State v. Mark***, 2008 WI App 44, 308 Wis. 2d 191, 747 N.W.2d 727.

2. For purposes of the initial commitment, should evidence (polygraph test results and the subject's statements during the polygraph examination process) and opinions based on the polygraph testing (particularly DOC testing) be excluded because the use of polygraph evidence is prohibited under the privilege set forth in Wis. Stat. § 905.065, and Wisconsin case law? In a recent unpublished *per curiam* decision, the Court of Appeals declined to address this issue, concluding that any error was harmless. ***State v. Fankhauser***, Case No. 2008AP2775. Meanwhile, in ***State v. Fischer***, 2010 WI 6,

322 Wis. 2d 255, 778 N.W.2d 629, our Supreme Court concluded that a defense expert's opinion was properly excluded because it was based on PBT test result evidence that is barred by Wis. Stat. § 343.303. The ***Fischer*** Court concluded: "Principles of statutory construction and our duty to respect clear legislative policy decisions require us to read Wis. Stat. § 343.303 to create an exception to § 907.03 and forbid us to read § 907.03 as nullifying the prohibition in § 343.303." ***Id.***, at 271, ¶ 4 (footnote omitted). *See also*, ***Estate of Neumann v. Neumann***, 2001 WI App 61, 242 Wis. 2d 205, 626 N.W.2d 821. **NOTE**: Wis. Stat. § 51.375(2)(b), creates an exception allowing for the admission of polygraph evidence derived from a DHS administered polygraph exam.

D. Some additional evidentiary issues that warrant consideration of a motion *in limine* or at least an objection at trial.

1. Testimony offered by government experts outlining the Chapter 980 pretrial screening process, from the initial ECRB review to the filing of the petition and determination of probable cause. ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887.

2. Prior to any allegation of bias, testimony offered by a government expert identifying the percentage of cases in which the expert has recommended commitment, or comparing the percentage of such recommendations by this examiner with other experts.

3. Testimony offered by a government expert suggesting a committed person is safeguarded by access to regular review and that there are various judicial review mechanisms available to terminate the commitment.

4. Testimony offered by a government expert commenting on the specialized treatment programs available to those committed at Sandridge—particularly the specialized program for psychopaths.

5. Testimony commenting on the underreporting of sex offenses when offered to suggest that a subject's risk to reoffend is actually higher than the percentages suggested by the actuarial instruments. Unless the studies upon which this assertion is based involve unreported offenses committed by individuals who have previously been convicted of a sex offense, isn't this assertion irrelevant? Certainly it is far more difficult for an individual to continue to commit sex offenses undetected once he or she has been convicted of a sex offense.

WISCONSIN STATUTES RELATING TO PERIODIC REVIEW AND DISCHARGE

980.07 Periodic reexamination and treatment progress; report from the department.

(1) If a person is committed under s. 980.06 and has not been discharged under s. 980.09 (4), the department shall appoint an examiner to conduct a reexamination of the person's mental condition within 12 months after the date of the initial commitment order under s. 980.06 and again thereafter at least once each 12 months 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. The examiner shall apply the criteria under s. 980.08 (4)(cg) when considering if the person should be placed on supervised release and shall apply the criteria under s. 980.09 (3) when considering if the person should be discharged. At the time of a reexamination under this section, the person who has been committed may retain or have the court appoint an examiner as provided under s. 980.031 (3), except that the court is not required to appoint an examiner if supervised release or discharge is supported by the examination conducted by the examiner appointed by the department. The county shall pay the costs of an examiner appointed by the court as provided under s. 51.20 (18)(a).

(2) Any examiner conducting a reexamination under sub. (1) shall prepare a written report of the reexamination no later than 30 days after the date of the reexamination. The examiner shall provide a copy of the report to the department.

(3) Notwithstanding sub. (1), the court that committed a person under s. 980.06 may order a reexamination of the person at any time during the period in which the person is subject to the commitment order. Any reexamination ordered under this subsection shall conform to sub. (1).

(4) At any reexamination under sub. (1), the treating professional shall prepare a treatment progress report. The treating professional shall provide a copy of the treatment progress report to the department. The treatment progress report shall consider all of the following:

(a) The specific factors associated with the person's risk for committing another sexually violent offense.

(b) Whether the person has made significant progress in treatment or has refused treatment.

(c) The ongoing treatment needs of the person.

(d) Any specialized needs or conditions associated with the person that must be considered in future treatment planning.

(5) Any examiners under sub. (1) and treating professionals under sub. (4) shall have reasonable access to the person for purposes of reexamination, to the person's past and present treatment records, as defined in s. 51.30 (1)(b), and to the person's patient health care records, as provided under s. 146.82 (2)(c).

(6) The department shall submit an annual report comprised of the reexamination report under sub. (1) and the treatment progress report under sub. (4) to the court that committed the person under s. 980.06 . A copy of the annual report shall be placed in the person's treatment records. The department shall provide a copy of the annual report to the person committed under s. 980.06, the department of justice, and the district attorney, if applicable. The court shall provide a copy of the annual report to the person's attorney as soon as he or she is retained or appointed.

(6m) If a person committed under s. 980.06 is incarcerated at a county jail, state correctional institution, or federal correction institution for a new criminal charge or conviction or because his or her parole was revoked, any reporting requirement under sub. (1), (4), or (6) does not apply during the incarceration period. A court may order a reexamination of the person under sub. (3) if the

courts finds reexamination to be necessary. The schedule for reporting established under sub. (1) shall resume upon the release of the person.

980.075 Patient petition process.

(1) When the department submits its report to the court under s. 980.07 (6), the person who has been committed under s. 980.06 may retain or have the court appoint an attorney as provided in s. 980.03 (2)(a).

(1m)(a) When the department provides a copy of the report under s. 980.07 (6) to the person who has been committed under s. 980.06, the department shall provide to the person a standardized petition form for supervised release under s. 980.08 and a standardized petition form for discharge under s. 980.09.

(b) The department shall, after consulting with the department of justice and the state public defender, develop the standardized petition forms required under par. (a).

(2)(a) Within 30 days after the department submits its report to the court under s. 980.07 (6), the person who has been committed under s. 980.06 or his or her attorney may submit one of the completed forms provided under sub. (1m) to the court to initiate either a petition for supervised release or a petition for discharge.

(b) If no completed petition is filed in a timely manner under par. (a), the person who has been committed under s. 980.06 will remain committed and the person's placement at a facility described under s. 980.065 or the person's supervised release status under s. 980.08 remains in effect without review by the court.

(3) If the person files a petition for discharge under s. 980.09 without counsel, the court shall serve a copy of the petition and any supporting documents on the district attorney or department of justice, whichever is applicable. If the person petitions for discharge under s. 980.09 through counsel, his or her attorney shall serve the district attorney or department of justice, whichever is applicable.

(4)(a) The petitioner may use experts or professional persons to support his or her petition.

(b) The district attorney or the department of justice may use experts or professional persons to support or oppose any petition.

(5) Subject to s. 980.03 (2)(a), before proceeding under s. 980.08 or 980.09 but as soon as circumstances permit, the court shall refer the matter to the authority for indigency determinations under s. 977.07 (1) and appointment of counsel under s. 977.05 (4)(j) if the person is not represented by counsel.

(6) At any time before a hearing under s. 980.08 or 980.09, the department may file a supplemental report if the department determines that court should have additional information.

980.09 Petition for discharge.

A committed person may petition the committing court for discharge at any time. The court shall deny the petition under this section 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.

(2) The court shall review the petition 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. In determining under this subsection whether facts exist that might warrant such a conclusion, the court shall consider any current or past reports filed under s. 980.07, 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 shall 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 shall set the matter for hearing.

(3) 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. 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.

(4) If the court or jury is satisfied that the state has not met its burden of proof under sub. (3), the petitioner shall be discharged from the custody of the department. If the court or jury is satisfied that the state has met its burden of proof under sub. (3), the court may proceed under s. 980.08 (4) to determine whether to modify the petitioner's existing commitment order by authorizing supervised release.

980.095 Procedures for discharge hearings.

(1) Use of juries.

(a) The district attorney or the department of justice, whichever filed the original petition, or the petitioner or his or her attorney may request that a hearing under s. 980.09 (3) be to a jury of 6. A jury trial is deemed waived unless it is demanded within 10 days of the filing of the petition for discharge.

(b) Juries shall be selected and treated in the same manner as they are selected and treated in civil actions in circuit court. The number of jurors prescribed in par. (a), plus the number of peremptory challenges available to all of the parties, shall be called initially and maintained in the jury box by calling others to replace jurors excused for cause until all jurors have been examined. The parties shall exercise in their order, the state beginning, the peremptory challenges available to them, and if any party declines to challenge, the challenge shall be made by the clerk by lot.

(c) No verdict shall be valid or received unless at least 5 of the jurors agree to it.

(2) Post verdict motions. Motions after verdict may be made without further notice upon receipt of the verdict.

(3) Appeals. Any party may appeal an order under this subsection as a final order under chs. 808 and 809.