

# 980 Legislative and Case Law Update

# New Legislation (2013 Act 84)

- Date of publication: December 13, 2013
- Encourages supervised release rather than discharge
- Focus has shifted to attainable treatment (current progress in treatment rather than past progress) and transitioning to the community
- BUT, discharge is now harder to attain
- Other related changes

# Supervised Release (980.08)

- 5 factors MUST be met (980.08(4)(cg))
  - 1. The person is making *significant progress in treatment* and the person's progress can be sustained while on supervised release.
  - 2. It is substantially probable that the person will not engage in an act of sexual violence while on supervised release.
  - 3. Treatment that meets the person's needs and a qualified provider of the treatment are reasonably available.
  - 4. The person can be reasonably expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department.
  - 5. A reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release.

# Changes to Supervised Release

- Changed the definition of “significant progress in treatment” (980.01(8)).
  - When petitioning for supervised release the focus is now on what the participants are currently doing in treatment rather than what they have already completed.
- Changed time lines for examiner (60 rather than 30) and who can be appointed.
- Changed the time for a court to hear a petition for SR (980.08(4)(a)): 120 days, instead of 30 days, after the report of the court appointed examiner is filed with the court. It can be extended for good cause.
- SVP must prove by clear and convincing evidence that the person meets criteria for supervised release. (980.08(4)). Codifies *State v. West*, 2011 WI 83.
- Expanded list of activities that SVP can leave his residence for, including to volunteer, education, treatment and exercise, supervision, or residence maintenance. (980.08(9)(a)).

# Significant Progress in Treatment

- 980.01(8) – current version states:
  - (8) “Significant progress in treatment” means that the person is doing all of the following:
    - (a) Meaningfully participating in the treatment program specifically designed to reduce his or her risk to reoffend offered at a facility described under s. 980.065.
    - (b) Participating in the treatment program at a level that is sufficient to allow the identification of his or her specific treatment needs and demonstrating, through overt behavior, a willingness to work on addressing the specific treatment needs.
    - (c) Demonstrating an understanding of the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his or her sexual offending and an ability to identify when the thoughts, emotions, behaviors, or sexual arousal occur.
    - (d) Demonstrating 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.

# Changes to Significant Progress in Treatment

- Old law (980.01(8))
  - “Significant progress in treatment” means that the person **has done** all of the following:
    - (a) Meaningfully **participated** in the treatment program...
    - (b) **Participated** in the treatment program at a level that **was** sufficient to allow the identification of his or her specific treatment needs and **then demonstrated** ... a willingness to work on addressing specific treatment needs.
- New law (980.01(8))
  - “Significant progress in treatment” means that the person **is doing** all of the following:
    - (a) Meaningfully **participating** in the treatment program...
    - (b) **Participating** in the treatment program at a level that **is** sufficient to allow the identification of his or her specific treatment needs and **demonstrating** ... a willingness to work on addressing specific treatment needs.

# Changes to Significant Progress in Treatment continued...

- Old law (980.01(8))
  - (c) ***Demonstrated*** an understanding of the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his or her sexual offending...
  - (d) ***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.
- New law (980.01(8))
  - (c) ***Demonstrating*** an understanding of the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his or her sexual offending...
  - (d) ***Demonstrating*** 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.

# Changes to Significant Progress in Treatment cont'd...

- Another way to see the changes...
- 980.01 (8) "Significant progress in treatment" means that the person ~~has done~~ is doing all of the following:
  - (a) ~~Meaningfully participated~~ participating in the treatment program specifically designed to reduce his or her risk to reoffend offered at a facility described under s. 980.065.
  - (b) ~~Participated~~ Participating in the treatment program at a level that ~~was~~ is sufficient to allow the identification of his or her specific treatment needs and then ~~demonstrated~~ demonstrating, through overt behavior, a willingness to work on addressing the specific treatment needs.
  - (c) ~~Demonstrated~~ Demonstrating an understanding of the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his or her sexual offending and an ability to identify when the thoughts, emotions, behaviors, or sexual arousal occur.
  - (d) ~~Demonstrated~~ Demonstrating 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.

# Changes to Significant Progress in Treatment cont'd...

- Corresponding changes:
  - Also changed what the treatment progress report “shall consider” (980.07(4)(b)): Whether the person ~~has made~~ is making significant progress in treatment or has refused treatment.
  - Supervised release factor under 980.08(4)(cg)1 changed: The person ~~has made~~ is making significant progress in treatment and the person’s progress can be sustained while on supervised release.

# Supervised Release Examiner (980.08(3))

- Extends time for examiner to complete an evaluation from 30 days to 60 days and the court can extend further for good cause.
- Clarifies that the court appoints an examiner at this stage for purposes of the court.
- Court must appoint examiner if: (1) the person requests appointment of an examiner and (2) the court has not previously appointed an examiner during the 12 month reexamination period.
- If person requests his *own* examiner the court can appoint the DHS examiner who conducted the person's annual reexamination if: (1) the examiner conducted the examination within 6 months before the SR petition was filed and (2) the report supports supervised release.

# Time Limits for Supervised Release Examiner (980.08(3)) cont'd...

- Within 20 days after receipt of the petition, the court shall appoint one or more examiners having for the court who have the specialized knowledge determined by the court to be appropriate, who shall examine the person and furnish a written report of the examination to the court within ~~30~~ 60 days after appointment, unless the court for good cause extends this time limit. If the person requests appointment of an examiner within 20 days after the filing of the petition, the court shall appoint an examiner for the person, unless the court appointed an examiner under s. 980.031 (3) or 980.07 (1) for the current reexamination period. If a report filed by an examiner appointed under s. 980.07 (1) to conduct a reexamination of the person's mental condition within the 6 months preceding the filing of the petition supports supervised release, the court may appoint that examiner as the examiner for the person under this subsection.

# What do the SR changes mean??

- The legislature has made supervised release more attainable
- The focus shifted to treatment – these are people that can be helped and released
- Public policy – encourage release with treatment and support rather than requiring them to fend for themselves if discharged
- BUT, clients may still want discharge instead of supervised release, it depends on the person

# Discharge (980.09)

- Current version states:
  - (1) A committed person may petition the committing court for discharge 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 *would likely* conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

# Changes to Discharge Proceedings

- Alters the pleading requirement the petitioner must meet before getting a discharge trial.
  - “would likely” rather than “may” lead a fact-finder to determine he no longer qualifies as SVP
- New statutory section re: appointment of an examiner for the person petitioning for discharge.
- Alters the procedure for court review of a discharge petition in determining whether a court must hold a discharge trial.
- Court is now required to consider supervised release for a petitioner after denying discharge at discharge trial.
- A court ordering discharge must delay execution of that order “for a period of time” not exceeding 10 days.
- Alters deadline for requesting jury trial.

# Changes to Discharge Pleading Requirements

- 980.09 (1) 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~~ would likely conclude the person's condition has changed ~~since the date of his or her initial commitment order~~ the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition, so that the person ~~does not meet~~ no longer meets the criteria for commitment as a sexually violent person.

# What does this mean??

- Petitioner must now allege facts that “would likely” (rather than “may”) lead a fact-finder to determine he no longer qualifies as an SVP
  - It’s a tougher standard to meet
  - BUT, what does “would likely” mean??
  - Need more evidence but how is that assessed?
  - Can the court engage in credibility determinations?
- The relevant time period for the petitioner’s condition to change is now from the last discharge hearing on the merits OR from the initial commitment if there have not been any discharge trials.

# Renumbering re: Discharge Petitions

- 980.075(3) is renumbered 980.09(1m)(a) – filing/service procedures for discharge petition.
- 980.075(4)(a) and (b) consolidated and renumbered as 980.09(1m)(c) –allowed to use experts to support/oppose discharge petition.
  - Applies also to supervised release (See 980.08(2m))
- 980.075(5) renumbered as 980.09(1m)(b) – appointment of counsel.
- These sections were all moved to the “Petition for discharge” section without substantive changes.

# Appointment of Examiner for Discharge Petition (980.09(1m)(d))

- Legislature created new section requiring appointment of examiner for person petitioning for discharge.
- Court must appoint if person is indigent and requests an examiner.
- BUT, not required to appoint an additional examiner if previously appointed examiner at time of annual reexamination.
- Court may appoint examiner who previously examined the person if (1) it was completed within the 6 months before discharge petition filed and (2) the examination recommended discharge.

# Appointment of Examiner for Discharge Petition (980.09(1m)(d))

- (d) After receiving a petition for discharge under sub. (1) and upon the request of the person filing the petition, unless the court previously appointed an examiner under s. 980.031(3) or 980.07(1) for the current reexamination period, the court shall appoint for the person an examiner having the specialized knowledge determined by the court to be appropriate. If an examination conducted under s. 980.07(1) within the 6 months preceding the filing of the petition supports discharge, the court may appoint the examiner who conducted that examination as the examiner for the person. The examiner shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in S. 51.30(1)(b), and patient health care records, as provided in s. 146.82(2)(c). The county shall pay the costs of an examiner appointed under this paragraph as provided under s. 51.20(18)(a).

# Changes to Review of Discharge Petitions (980.09(2) & (3))

- Court is no longer required to review the petition within 30 days.
- Now, the court “may” hold a hearing to determine whether the person’s condition has sufficiently changed so that a fact-finder “would likely” conclude the person no longer meets the criteria for commitment.
- The court can now consider the entire record.
- If after reviewing the “record” the court concludes it does not contain facts from which the fact-finder “would likely” conclude the person no longer meets the criteria for commitment, then the court shall deny the petition.
- If the court finds the opposite then it must schedule a trial within 90 days.

# Changes to Review of Discharge Petitions (980.09(2) & (3))cont'd...

- 980.09 (2) ~~The court shall review the petition within 30 days and~~ In reviewing the petition, the court 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 person's condition has sufficiently changed such that a court or jury would likely conclude the person no longer meets the criteria for commitment as a sexually violent person. In determining under this subsection whether facts exist that might warrant such a conclusion the person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court ~~shall~~ may consider the record, including evidence introduced at the initial commitment trial or the most recent trial on a petition for discharge, 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 record does not contain facts from which a court or jury may would likely conclude that the person does not meet no longer meets the criteria for commitment, the court shall deny the petition. If the court determines that facts exist the record contains facts from which a court or jury could would likely conclude the person does not meet no longer meets the criteria for commitment, the court shall set the matter for hearing trial.

# Changes to Review of Discharge Petitions (980.09(2) & (3))cont'd...

- 980.09(3): The court shall hold a ~~hearing~~ trial 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~~ person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment as a sexually violent person. ~~The~~ At trial, 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.

# What do the discharge changes mean??

- The SVP now has a higher standard to meet before getting a discharge trial: whether the fact-finder “would likely” conclude the person no longer meets the criteria.
  - It is unknown what that standard means
- The court can look at the entire record when determining whether the petition is sufficient (just codifies *Arends*).
- Presumably, it will be harder to get a discharge trial.

# Consideration of Supervised Release (980.09(4))

- The court must now consider SR after denial of discharge at a discharge trial
- The petitioner can waive the court's consideration of SR
  - BUT, the waiver is treated as a denial of SR when calculating when he may file a subsequent petition of SR (see 980.08(1))
- Again, the legislature is encouraging treatment via supervised release

# Consideration of Supervised Release (980.09(4)) cont'd...

- 980.09 (4) If the court or jury is satisfied that the state has not met its burden of proof under sub. (3), the ~~petitioner~~ person 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~~ shall proceed under s. 980.08 (4) to determine whether to modify the ~~petitioner's~~ person's existing commitment order by authorizing supervised release, unless the person waives consideration of the criteria in s. 980.08 (4)(cg). If the person waives consideration of these criteria, the waiver is a denial of supervised release for purposes of s. 980.08 (1).

# Delay of Discharge Order (980.09(5))

- If the court orders discharge, it can stay the execution of that order for up to 10 working days.
- This allows DHS time to notify victims and their family members and DOC.

# Delay of Discharge Order (980.09(5)) cont'd...

- 980.09 (5) If a court orders discharge of a committed person under this section, the court shall stay the execution of the order so that the department may comply with its statutory duties under s. 980.11 (2) and (3). The stay of execution may not exceed 10 working days and shall be for as short a period as necessary to permit the department to comply with s. 980.11 (2) and (3).

# Deadline for requesting jury trial (980.095(1)(a))

- Petitioner or state must ask for jury trial 10 days after court makes decision on whether petition warrants a discharge trial.
- Therefore, petitioner (or state) does not have to request jury trial before court determines whether their will even be a trial.

# Deadline for requesting jury trial (980.095(1)(a)) cont'd...

- 980.095 (1) (a) The district attorney or the department of justice, whichever filed the original petition, or the petitioner-person who filed the petition for discharge or his or her attorney may request that a hearing trial 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-determination by the court that a court or jury would likely conclude under s. 980.09 (1) that the person's condition has sufficiently changed.

# Supplemental Reports by DHS (980.07(7))

- 980.075(6) was renumbered as 980.07(7).
- Court must now accept and allow testimony about supplemental reports filed by DHS anytime prior to a supervised release or discharge hearing.
- 980.07 (7): 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. The court shall accept the supplemental report and permit testimony from the department regarding the report or any relevant portion of the report.

# General changes

- “Petitioner” is changed to “person” when referring to the person subject to SVP. “Petitioner’ means the agency or person that filed a petition under s. 980.02.” (980.01(3)).
- Women subject to 980 may now also be placed at the Wisconsin Women’s Resource Center. (980.065(1r)).
- Court must appoint an examiner for SVP if he requests one at time of 12-month reexamination. It removes ambiguity about whether court may choose not to appoint examiner. (980.07)(1)).

# Retroactive or Prospective

- Publication date was December 13, 2013
- Did not specify when it takes effect so it took effect the date after the publication date (991.11).
- Whether you want it to be retroactive or prospective depends on whether you are seeking discharge or supervised release.
- Depends on whether the changes are procedural or substantive.

# Case Law Update

- Application of *Daubert*
  - *State v. Alger*, 2013 WI App 148
  - *State v. Knipfer*, 2014 WI App 9
- Appointment of Counsel/Independent Examiner
  - *State v. Jones*, 2013 WI App 151
- Discharge Procedure
  - *State v. Arends*, 2010 WI 46
  - *State v. Ermers*, 2011 WI App 451
  - *State v. Schulpfus*, 2012 WI App 134
  - *State v. Richard*, 2014 WL 625427
- Pending in Wisconsin Supreme Court
  - *State v. Spaeth*, 2012AP2170

# Application of *Daubert* standard

- Does *Daubert* standard apply to discharge petitions filed after the effective date (2/1/11), even if the original petition was filed before effective date?
  - COA – it only applies when the original petition was filed after 2/1/11.
  - SCOW – petitions pending in both *Alger* and *Knipfer*, court has ordered state to respond, will likely know something by mid-summer.
- Both *Alger* and *Knipfer* involved an original petition filed before the effective date and a discharge petition filed after.

# Application of *Daubert* standard: *State v. Alger*

- *Daubert* std applies “to *actions* or special proceedings that are *commenced* on the effective date”
- Does a discharge petition “commence” a new “action”?
  - COA concludes DP is “merely another step in that existing lawsuit”
  - COA cites several 980 sections referring to things the “committing court” must do to justify its conclusion that the court has a “continuing administrative authority” over the case
- Problems with decision
  - The committing court is not required to take any action unless the committed person triggers the court to act (i.e. a discharge petition)
  - 980.075(2)(b): if the person does not file a petition for discharge or supervised release after the annual reports are filed, the commitment “remains in effect without review by the court”
  - Only exception is the court can order reexamination at any time (980.07(3)), which is rare at best
  - “continuation of existing lawsuit” – the conclusion of the original commitment is final appealable order

# Application of *Daubert* standard: *State v. Alger*, cont'd...

- Equal Protection
  - More stringent std for newer cases
  - Applied rational basis test
  - Rejected claim because say action was “pending” on effective date and the legislature had to pick some date
- Problems with decision
  - Misinterprets *Alger*'s arguments
  - Disparate treatment with no legitimate purpose – in 20 years someone that has been continually committed still would not be allowed to use the *Daubert* std (if it is still around then)

# Application of *Daubert* standard: *State v. Knipfer*

- Raised same claims as *Alger* (and therefore those were rejected) but added two more claims
  - Equal protection argument requires strict scrutiny analysis
  - Due process requires an evidentiary std that ensures a more accurate and reliable outcome
- The court rejected both claims

# Application of *Daubert* standard: *State v. Knipfer*, cont'd...

- Strict Scrutiny
- Argued because liberty interest at stake
- Court relies on *Milwaukee County v. Mary F.R.*, 2013 WI 92 to say rational basis (even though court said 980 commitments involve greater liberty restrictions)
- Court says being subject to pre-*Daubert* std does not mean deprived of meaningful opportunity to challenge expert evidence
- Due Process
- Court says even if *Daubert* std increases reliability it does not mean proceedings are unreliable without the std

# Appointment of Counsel/Independent Examiner

- *State v. Jones*, 2013 WI App 151
- After his annual reexam, Jones requested and was denied appointment of an independent examiner and counsel prior to review of his petition for discharge
- COA concludes entitled to both *before* reviewing the discharge petition
- Petitioner's right to an independent examiner does not depend on the outcome of the paper review

# Discharge Procedure: *State v. Arends*

- Two-step process to determine whether to hold a discharge trial
  - (1) Under 980.09(1) - paper review of petition to determine whether it alleges facts that reasonable trier of fact could conclude that petition does not meet criteria for SVP. If so, then move to 980.09(2).
  - (2) Review of specific items (i.e. past and current reports), can conduct hearing, must decide whether petition and supporting documents contain any facts from which a reasonable trier of fact could conclude SVP std is not met.
- Cannot weigh evidence
- Limited review of the sufficiency of the evidence
- With new legislation:
  - The std has increased, could is now “would likely”
  - Will the new std lead to credibility determinations and weighing the evidence?

# Discharge Procedure: *State v. Ermers*, 2011 WI App 113

- Addresses the meaning of “condition has changed” when trying to get a discharge hearing.
  - Here, involved Static-99’s overestimation of risk
  - COA reversed denial of discharge hearing
- COA concluded it encompassed all the changes that a fact-finder could result in a person not meeting the SVP criteria.
- This includes a change in professional knowledge or research used to evaluate SVP criteria.
- “the circuit court may not deny a discharge petition without a hearing if the petition alleges facts from which a fact finder could determine that, as a result of any one of those changes, the person does not meet the criteria for a sexually violent person.”
  - Again, the new std alters this determination but it is unknown exactly how much.

# Discharge Procedure: *State v. Sculpus*, 2012 WI App 134

- Can person rely solely on evidence already considered and rejected by a previous trier of fact?
  - No. Here, doctor recalculated Static-99R based on reflection.
  - COA cited *State v. Combs*, 2006 WI App 137 and *State v. Kruse*, 2006 WI App 179
- “An expert’s opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient for a new discharge hearing under s. 980.09(2).”
- COA agreed with defendant that doctor’s report expressed a new opinion BUT the change was not based on any new fact.
- COA concluded the “recalculation” based upon further reflection was NOT sufficient for a discharge hearing.

# Discharge Procedure: *State v. Richard*, 2014 WL 625427

- Petition based on new research involving Static-99 and age (Static 99R).
- When a petitioner alleges that he is no longer a SVP, and supports his petition with a recent psychological evaluation applying new professional research, the petitioner is entitled to a discharge trial.
- In this case, even though the data relied on was conceptually in existence at the time of the previous trial, the paper the expert relied on was not (the 99R scoring tables had not yet been adjusted).
- COA concluded Richard was entitled to a discharge trial.

# Pending in SCOW: *State v. Spaeth*

- Complicated/unique facts
  - 1992 SO conviction, paroled 2004
  - 2006 new SO, 1992 parole revoked
  - Convicted on new SO in 2007, discharge from '92 case in '08, new SO vacated (twice)
  - 980 petition filed in 2010 with '06 SO as predicate offense, when vacated state amends with '92 SO as predicate offense BUT discharged from that case in '08
- Was petition timely even though filed after completed '92 sentence and only being held on '06 case, which was vacated?
- If SCOW agrees with the state then petition could be predicated on previous, now-discharged case as long as the person is about to be released from *some* sort of custody, regardless of connection between custody and SO.