STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP950

IN RE THE COMMITMENT OF THORNON F. TALLEY

STATE OF WISCONSIN,

Petitioner-Respondent,

vs.

THORNON F. TALLEY,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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PETITION FOR REVIEW

The Respondent-Appellant-Petitioner, Thornon F. Talley, by Attorney David R. Karpe, of Madison, Wisconsin, hereby petitions this Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the October 19, 2015 decision of the court of appeals in this case.

ISSUES PRESENTED

1. Was the Petitioner entitled to an evidentiary hearing on his petition for discharge from Chapter 980 commitment which included information that the Petitioner had terminated sexual acting out and where a psychologist reported improvement in an important area of functioning?

What the circuit court found: The circuit court found that the petition did not meet the requirements of § 980.09(2).

What the court of appeals held: The court of appeals held that the petition presented no significant change from the facts in a previous petition

Why the Wisconsin Supreme Court should grant review: The Court should grant this petition to clarify and develop the law regarding when a person is entitled to a hearing to end indefinite commitment under Chapter 980.

2. Should this case be remanded to the circuit court for a review that meets the requirements of § 980.09(2), namely, that the circuit court review all previous evaluations of a Chapter 980 Respondent?

What the circuit court found: The circuit court implicitly found that the requirements of a Wis. Stat. § 980.09(2) review were met by the court's comparison of just three evaluations done by a single evaluator.

What the court of appeals held: The court of appeals chose to conduct its own *de novo* of the record rather than to order a remand.

Why the Wisconsin Supreme Court should grant review: The Court should grant this petition in order to help develop the law regarding interpretation of Wis. Stat. § 980.09(2). *See State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513 (review is *de novo* but Wisconsin Supreme Court has discretion to remand to circuit court for review of record).

CRITERIA FOR REVIEW

The Court should grant review on the first issue because this case presents a real and significant question that will help clarify and develop the law and give guidance to trial courts regarding when a person is entitled to a Chapter 980 discharge hearing.

Regarding the second issue, granting review in this case will help develop the law regarding develop the law regarding interpretation of Wis. Stat. §980.09(2). *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513, seemed to suggest a possible preference for remand as a remedy even though *de novo* review appears to be an option. This case presents a good opportunity for the Court to make some inroads in this area.

Relevant Statutory Sections

Wisconsin Stat. § 980.09, reads, in relevant portion:

> **Petition for discharge.** (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 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.

STATEMENT OF THE CASE

This was a direct appeal under Wis. Stat. (Rule) §809.30 of the denial without a trial of a petition for discharge from a Chapter 980 sexual predator commitment.

By way of background, the Petitioner, Thornon F. Talley, was originally committed in 2005 as a sexually violent person under Chapter 980, in Dane County Circuit Court Case 2004CI1. He petitioned for discharge in 2011, and went to trial

on that petition, but the jury ruled against him. *See In re Commitment of Talley,* 2015 WI App 4, 359 Wis.2d 522, 859 N.W.2d 155, petition for review denied (table at 2015 WI 24, ___ Wis.2d ___, 862 N.W.2d 602). In that appeal, the court of appeals held that it did not violate principles of due process to continue the commitment upon "clear and convincing evidence" that Mr. Talley remained a sexually violent person *Talley*, 2015 WI App 4 at ¶¶ 2, 18-35.

On July 12, 2012, Mr. Talley filed the instant petition for discharge *pro se*, which petition he supported with a report by Dr. Richard Elwood. R242, 244; App. 7,14. Dr. Elwood's report, dated July 3, 2012, offered the opinion that Mr. Talley had made "recent progress" to reduce his risk in the area of social and emotional functioning as a new and crucial piece of information. R242:5; App. 18. The report also noted that Mr. Talley's behavior in the institution had changed in that his recent misconduct reports consisted of five "failure to follow directions" and four "disruptive conducts." There was no allegation in the 2012 report that Mr. Talley had been acting out sexually since the date of the last evaluation.

The report that Dr. Elwood had filed prior, dated June

23, 2011, had opined that at that time Mr. Talley had *not* made progress in the area of social and emotional functioning. R203:5; App. 26. The 2011 report also stated that Mr. Talley had received a behavior disposition report for sexual contact on May 16, 2011. Id.

It is noted that at the 2011 trial, Dr. Elwood had testified that Mr. Talley tended to isolate himself at Sand Ridge Secure Treatment Center:

> Mr. Talley tends to isolate. He didn't isolate at [the Wisconsin Resource Center]. He seems to socialize or correspond with members of his family. But it's not clear that he's reduced his risk on that factor either.

R272:45; App. 45.

The State filed a memorandum opposing Mr. Talley's 2012 petition on July 26, 2012. R246. The State argued that Dr. Elwood's finding that Mr. Talley was not a sexually violent person was the same finding he had made before. Id.

Mr. Talley replied on August 1, 2012, that Dr. Elwood had pointed to Mr. Talley's improvement in the social and emotional functioning area, and also, significantly, that at the 2011 trial, the State had called a witness from Sand Ridge

Secure Treatment Center to

> describe every single instance of Mr. Talley exposing, rubbing, or masturbating himself in the open and making inappropriate sexual remarks from January 26, 2009 to October 11, 2011. [R276: 66-77]. According to [this witness, Lloyd] Sinclair, "[t]he fact that we continue to see sexual misbehavior alarms for us [sic]." [R276:80]. Arguably a significant moment in the trial occurred when, a couple of minutes later, Mr. Sinclair explained "[s]o our concern is that since Mr. Talley continues to engage in these behaviors that it may foreshadow behaviors that he could engage in if he were released to reside in the community." [Id.]. The fact that Mr. Talley has ceased to exhibit these types of behaviors is certainly new information that a court or jury could consider to conclude that he is no longer a sexually violent person.

R247:5; App. 50.

Judge O'Brien accepted the State's argument and entered an order on August 22, 2012, denying the petition without a hearing. R248, App. 4. In that order, she stated, "The conclusions reached by Dr. Elwood in his latest report are the same as in his two previous reports." R248:2, App. 5. She went on to find,

> In regard to the fact that Mr. Talley is engaging in more social behavior, Dr. Elwood comments "I concluded that Mr. Talley has made recent progress to reduce his risk on

> this factor." However when summarizing the entire section on Dynamic Risk Factors, Dr. Elwood says, "The dynamic factors do not alter the low risk of Mr. Talley committing sexually violent acts."[1] Report, p. 6.

Id.

Mr. Talley appealed the circuit court's decision. On October 19, 2015, the court of appeals filed a summary decision affirming the circuit court. *In re commitment of Talley*, 2013AP950 (unpublished slip op.). In that opinion, the court of appeals held that "Talley's self-reporting that he has begun socializing with more peers and joined the fitness group, and that he continues to correspond with some unknown number of family members, does not constitute a significant change from the facts that the jury rejected in the 2011 petition." *Id.* at 3-4.

The court of appeals also rejected Mr. Talley's argument that his institutional conduct had undergone a significant transformation in that he was no longer offending sexually: "We reject Talley's argument that the absence of sexual

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[1]Dr. Elwood had stated in his previous reports that he did not believe that Mr. Talley fit the definition of "sexually violent person," even without considering the dynamic factors. R203,210. (footnote not in Judge O'Brien's order).

misconduct in the 2012 report constitutes a significant change." *Id.* at 3.

Mr. Talley now seeks review of this adverse decision of the court of appeals pursuant to Wis. Stat. § 808.10.

ARGUMENT

I. The Court Should Grant Review in Order to Clarify How Far a Petitioner Must Go to Prove What Constitutes a "New" Fact or a Significant Change in Conduct or Risk Before Getting a Discharge Trial.

Dr. Elwood wrote in the updated 2012 report that he had a new and different conclusion, and one favorable to Mr. Talley, in the area of social and emotional functioning. App. 18. The court of appeals said this was insufficient to get Mr. Talley a trial because "Talley's self-reporting that he has begun socializing with more peers and joined the fitness group, and that he continues to correspond with some unknown number of family members, does not constitute a significant change from the facts that the jury rejected in the 2011 petition." *In re commitment of Talley*, 2013AP950, slip op. at 3-4.

Dr. Elwood also noted in the "Self-Regulation/Lifestyle

Instability" section, that "Mr. Talley has not reduced his risk on this factor," but Dr. Elwood noted that the nature of the misconduct was no longer sexual. App. 26. On this point, the court of appeals rejected the "argument that the absence of sexual misconduct in the 2012 report constitutes a significant change." *In re commitment of Talley*, 2013AP950, slip op.at 3.

Although Dr. Elwood did not explain clearly why Mr. Talley had not reduced his risk in the area of Self-Regulation/Lifestyle Instability, despite solid evidence of significant change in sexual behavior, the nonchange of an opinion, as opposed to actual conduct, seems to provide slim support for denying Mr. Talley a trial.

A petitioner's expert's opinion may be insufficient to entitle the petitioner to a discharge hearing if the expert's opinion was not based on any changes in the petitioner's behavior since the initial commitment hearing, but if there are any changes, is it really appropriate to deny a detainee a full release hearing? *See, e.g., In re commitment of Combs*, 2006 WI 137, ¶1, 295 Wis.2d 457, 720 N.W.2d 684 ("The [expert's] opinion did not depend on any fact or professional knowledge or research that was not considered by the experts testifying at

the commitment trial.")

The circuit court and the court of appeals held Mr. Talley to a higher standard here: the question the lower courts addressed was not whether there were any changes in the petitioner's behavior but only changes that the lower courts deemed significant. So, a further reason to grant review in this case is to ensure that courts in the state are applying the same standard: should the standard be, as *Combs* described "any facts," or is that insufficient and should this language in *Combs* be withdrawn?

II. The Court Should Also Grant Review in Order to Develop the Law of When Appellate Courts Should Remand Chapter 980 Discharge Cases to the Circuit Court for Review of "All Past and Present Reports" and When the Appellate Courts Should Conduct a *De Novo* Review.

In determining whether to grant an evidentiary hearing to Chapter 980 detainees seeking discharge, circuit courts are required by § 980.09(2) to consider all current or past reports filed under Wis. Stat. § 980.07. *See State v. Arends*, 2010 WI 46, ¶45, 325 Wis. 2d 1, 784 N.W.2d 513.

In this case, the court of appeals determined, "Whether

the petition alleges sufficient new facts to justify a hearing is a question of law that we review de novo. ... *Arends*, 2010 WI 46 [at] ¶13" *In re commitment of Talley,* 2013AP950 at 2. Then the court of appeals went on to state,

> Because we review the issue *de novo*, we need not decide Talley's alternative argument that the matter should be remanded to the circuit court for consideration of the entire record. At the time the circuit court reached its decision, parts of the record had been transmitted to this court for Talley's previous appeal. This court has access to the entire record and we conclude that, as a matter of law, Talley's petition and supporting report do not raise sufficient facts to distinguish his present condition from the condition described in the 2011 petition.

Id., n. 3

This points to a controversy that the Court should consider resolving. The Court noted in *Arends*,

> Some confusion arose at oral argument as to how the circuit court can fulfill its obligation to consider all these items when some of them may not be available or otherwise within the record before the court. The most reasonable reading of this statute is that the court must review all the items enumerated in § 980.09(2) that are in the record at the time of review. The circuit court need not, therefore, seek out evidence not currently before it. It may, however, order the production of any of the

> enumerated items not in the record, but is not required to do so. The statute supports this interpretation in granting the court the discretion at this stage to hold a separate hearing, distinct from and prior to any discharge hearing. Thus, review under § 980.09(2) is of the specific items listed in the statute, if available or so requested by the court.

2010 WI 46 at ¶33.

This seems to say that if the record is in the appellate courts, circuit courts are excused from compliance with Wis. Stat. § 980.09(2). How far is the Court willing to go with this? Suppose the only available records are the petition for discharge itself? Does that suffice? When must or should a circuit court request a part of a record on appeal? Do Dane County judges have a special responsibility because the appellate record is located three blocks away from the Dane County Courthouse? This is an important question, because so many Chapter 980 proceedings originate in Dane County. *See* § 980.02(5) (department of justice may file commitment petition in Dane County regardless of detainee's residence, place offense committed or place of detention).

CONCLUSION

For the reasons set forth above, Mr. Talley respectfully requests that this Court grant review in this matter.

Respectfully submitted this 17th day of November, 2015.

/s/ David R. Karpe

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CERTIFICATE

I certify that this petition meets the criteria under Rules 809.19(8)(b), and 809.62(4), Stats., for a petition produced with a proportional serif font. The petition is 2986 words long.

Signed,

/s/ David R. Karpe_____
David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition which complies with the requirements of s. 809.62(4)(b). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Signed,

/s/ David R. Karpe_____
David R. Karpe