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March 7, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2315-NM

In re the commitment of Carl Cornelius Gilbert, Jr.: State of
Wisconsin v. Carl Cornelius Gilbert, Jr. (L.C. #2006CI12)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Carl Gilbert appeals the order that dismissed his petition for discharge from a commitment as a sexually violent person under Chapter 980 of the Wisconsin Statutes, without a trial. Attorney Hannah Schieber Jurss has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);¹ *see also Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403

¹ All references to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses whether Gilbert was entitled to a trial on his petition, and whether the circuit court erred in continuing a non-evidentiary hearing on the petition without Gilbert present. Gilbert was sent a copy of the report and filed a response alleging ineffective assistance of counsel, to which counsel filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues.

A person committed under Chapter 980 is entitled to periodic reexamination under WIS. STAT. § 980.07, and may petition the court for discharge, WIS. STAT. § 980.09(1). However, the court shall deny a discharge petition without a trial unless the petition alleges facts from which the court or a jury could conclude that the petitioner's condition has changed since the initial commitment, such that he or she no longer meets the criteria for a sexually violent person—that is, that the subject: (1) committed a sexually violent offense; (2) currently has a mental disorder affecting the emotional or volitional capacity and predisposing the subject to engage in acts of sexual violence; and (3) is dangerous because the mental disorder makes it more likely than not that the subject will engage in future acts of sexual violence. *See* WIS. STAT. § 980.01(7); § 980.09(1); § 980.09(3); and WIS JI—CRIMINAL 2506.

In making its determination as to whether a trial is warranted, the court may consider the facts alleged in the petition and the State's response, any past or current evaluations in the record or other documents provided by the parties, and arguments by counsel. WIS. STAT. § 980.09(2). This limited paper review to test the sufficiency of the petition is aimed at weeding out meritless or unsupported claims. *See State v. Arends*, 2010 WI 46, ¶¶26-30, 325 Wis. 2d 1, 784 N.W.2d 513.

An expert opinion that the petitioner is no longer sexually violent may provide sufficient grounds to warrant a trial if based upon “something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent,” such as information about the committed person that did not occur until after the prior adjudication or new professional knowledge about how to predict dangerousness. *See State v. Combs*, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. Put another way, a circuit court can deny a discharge petition based upon a new expert opinion if the expert simply disagrees with the diagnoses or conclusions that led to the original commitment, but must grant a trial if the petition alleges any change in either the petitioner, or in the professional knowledge or research used to evaluate a petitioner’s mental disorder or dangerousness, from which a fact finder could determine that the petitioner does not meet the current criteria for commitment. *See State v. Ermers*, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540.

Gilbert’s petition for discharge was based upon an annual evaluation by court-appointed psychologist William Merrick, Ph.D. Merrick diagnosed Gilbert with Schizoaffective Disorder, Bipolar Type; Anxiety Order, Not Otherwise Specified; Intermittent Explosive Disorder; Polysubstance Dependence, In Sustained Remission in a Controlled Environment; and Antisocial Personality Disorder—the last of which Merrick opined predisposed Gilbert to commit sexually violent acts.

With regard to static risk factors, Merrick employed the RRASOR and the Static-99 actuarial instruments to evaluate the risk that Gilbert would commit future acts of sexual violence. The results placed Gilbert in the high risk range. With regard to dynamic risk factors, Merrick observed that Gilbert had not yet completed an appropriate sex offender treatment

program, and found no evidence that Gilbert had been able to modify his cognitive distortions about women, or that he had made any significant progress in the areas of socio-affective functioning or self-management. Taken together, Merrick concluded that Gilbert still met the statutory criteria for commitment.

The State filed an *Arends* motion seeking to deny Gilbert's petition without a trial. At a hearing on that motion, Gilbert's attorney indicated that she did not have any facts with which to dispute the motion. Gilbert, who was participating in the hearing by video-conference, indicated that he wanted to discharge counsel. When the court refused to allow Gilbert to do so, Gilbert walked out of the video-conference room. The court indicated that Gilbert had forfeited his right to further participate because he had "refused to follow Court orders to remain quiet and wait his turn and he just kept interrupting" and that he had left of his own accord.

We agree with counsel's assessment that the circuit court properly continued the hearing after Gilbert left, and that, based upon Merrick's uncontested report, the court properly determined that no trial was warranted on Gilbert's petition for discharge.

Gilbert argues that counsel provided ineffective assistance by failing to seek an independent evaluation for him, and by refusing to file a *Daubert*² motion or other pretrial motions. However, counsel explains in her supplemental no-merit report that she *did* consult with an expert who had recently done an evaluation of Gilbert in conjunction with another discharge petition, and that the expert could not provide an opinion that would support discharge. Additionally, counsel notes that Gilbert was committed before the *Daubert* standard was adopted

² See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

in Wisconsin, and so counsel could not use it as a basis to subsequently challenge Gilbert's commitment. Again, we agree with counsel's assessment.

Upon our independent review of the record, we have found no other arguable basis for reversing the order denying discharge. *See State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 184. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the order dismissing the petition for discharge is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Hannah Schieber Jurss is relieved of any further representation of Carl Gilbert, Jr., in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals