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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP1579

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In re the commitment of Edwin C. West:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

EDWIN C. WEST,

Respondent-Appellant-Petitioner.

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On Appeal from an Order Denying Supervised Release Pursuant to Chapter 980, Entered in the Milwaukee County Circuit Court, The Honorable M. Joseph Donald, Presiding

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# BRIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER

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## ISSUE PRESENTED

Does 2005 Wis. Act 434 §118 (codified at Wisconsin Statutes §980.08(4)(cg)) shift the burden of proof at a supervised release hearing under Chapter 980 to the civilly-committed respondent?

The circuit court held that this new statute shifted burden of proof at a supervised release hearing under Chapter 980 to civilly-committed respondents. The court of appeals affirmed.

## STATUTES INVOLVED

Wisconsin Statutes §980.08(4)(cg) provides:

> (cg) The court may not authorize supervised release unless, based on all of the reports, trial records, and evidence presented, the court finds that all of the following criteria are met:
>
> 1. The person has made 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.

Wisconsin Statutes §980.08(4)(b) (2004) (repealed 2005 Wis. Act. 434 §116), provided:

> (b) The court shall grant the petition unless the state proves by clear and convincing evidence one of the following:
>
> 1. That it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care.
>
> 2. That the person has not demonstrated significant progress in his or her treatment or the person has refused treatment.

## STATEMENT OF THE CASE

Edwin C. West was committed pursuant to Wisconsin Statutes Chapter 980 as a sexually violent person on July 1, 1997. (14). By petition dated April 18, 2008, Mr. West sought supervised release. (94).

Prior to the passage of 2005 Wisconsin Act 434 §118, the statutes explicitly placed on the state the burden of proof at an evidentiary hearing on a petition for supervised release. *See* Wis. Stats. §980.08(4)(b)(2005-06). 2005 Wisconsin Act 434 §118 (codified at Wis. Stats. §980.08(4)(cg)) replaced those provisions with a statute that did not use the words "burden of proof" at all. Instead, the new statute barred a circuit court from authorizing supervised release unless certain criteria were met. Wis. Stats. §980.08(4)(cg).

Prior to the evidentiary hearing on his petition for supervised release, Mr. West filed a motion seeking to have the circuit court hold that the burden of proof at the hearing remained with the state pursuant to Wisconsin Statutes

§980.08(4)(cg). (96). On August 1, 2008, just before the supervised release hearing, the circuit court orally denied the motion and held that the statutes plainly placed the burden of proof at the hearing on the respondent "with respect to meeting those conditions for supervised release." (122:7-8). The circuit court further held that shifting the burden to the respondent violated neither the due process nor equal protection clauses of the constitution. (122:8).

The circuit court then held evidentiary hearings on the petition for supervised release on August 1, 2008 and on October 10, 2008. (122; 123). Following the hearings, the circuit court denied the petition for supervised release. (123:97-105; 126).

Notice of appeal was timely filed on June 18, 2009. (112).

On August 10, 2010, in a decision not recommended for publication, the court of appeals affirmed, relying on ***In re the Commitment of Rachel***, 2010 WI App 60, 324 Wis. 2d 465, 782 N.W.2d 443.[1] (App. 101-105). The court of appeals in ***Rachel*****,** 324 Wis. 2d at 476, held that, under the amended statute's plain language, "the burden of proof now rests on the petitioner to show that the five statutory criteria are met." The court of appeals also rejected any argument that such a change rendered Chapter 980 unconstitutional because the revision did not change the requirement for periodic review. ***Id***. at 447-48.

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[1] Mr. Rachel never filed a petition for review, most likely because he was discharged from Chapter 980 commitment in ***In re Commitment of Rachel***, Kenosha Co. Case No. 94CF000469, on March 29, 2010, four days after the decision in ***In re Commitment of Rachel***, 2010 WI App 60.

## ARGUMENT

### Wisconsin Statutes § 980.08(4)(cg) Does Not Shift the Burden of Proving Suitability for Supervised Release from the State to the Person Committed Under Chapter 980.

Wisconsin Statutes §980.08(4)(cg) provides that "the court may not authorize supervised release unless" certain criteria are met. The statute is silent on who has the burden of proof of establishing that these criteria are met. Wis. Stats. §980.08(4)(cg). This statute replaced Wisconsin Statutes §980.08(4)(b) (2004) which explicitly placed the burden of proof on the state. The language, history, scope, and context of Wisconsin Statutes §980.08(4)(cg) demonstrate that the legislature did not intend this new statute to change the burden of proof from the state to the person committed. In addition, the need to avoid interpreting the statute so as to render it unconstitutional also mandates that the burden of proof remain with the state. This Court therefore should hold that the trial court erred in placing the burden of proof on Mr. West, vacate the order denying supervised release, and remand the matter to the circuit court for a new supervised release hearing.

The meaning of Wisconsin Statutes § 980.08(4)(cg) is a matter of statutory interpretation. Statutory interpretation presents questions of law which this Court reviews de novo. ***State v. Michels***, 141 Wis. 2d 81, 87, 414 N.W.2d 311 (Ct. App. 1987).

#### A. The Language, History, Scope and Context of Section 980.08(4)(cg) Demonstrate that the Legislature Intended that the Burden of Proof Remain with the State.

When appellate courts construe a statute, they attempt to "faithfully give effect to the laws enacted by the legislature." ***State ex rel. Kalal v. Circuit Court of Dane Co.***,

2004 WI 58 ¶44, 271 Wis. 2d 633, 662, 681 N.W.2d 110. The courts begin by assuming that "the legislature's intent is expressed in the statutory language." ***Id***. They first look to the plain language of the statute to discern this intent. ***Id.*** If the statute is unambiguous, then the courts do not look beyond the plain words of the statute. ***Id.***

1. Section 980.08(4)(cg) is ambiguous.

A statute is "ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Kalal***, 271 Wis. 2d at 664. Silence on a topic can render a statute ambiguous. *See, e.g.,* ***Forest Co. v. Goode***, 219 Wis. 2d 654, 664, 579 N.W.2d 715 (1998); ***State v. Hufford***, 186 Wis. 2d 461, 464-65, 522 N.W.2d 26 (Ct. App. 1994). In this case, the absence of language in Wisconsin Statutes § 980.08(4)(cg) specifically placing the burden of proof on the person committed makes this statute on its face capable of being understood in any of three ways.

a. The best reading of Section 980.08(4)(cg) is that the burden of proof remains on the state.

The best view of the statute is that the burden of proof, which previously was on the state, remains on the state. The legislature, which clearly knew how to place the burden of proof clearly, did not make any overtly place it on the person committed.

Given that the previous version of the statute clearly, explicitly, and unambiguously indicated that the burden was on the state and what the burden of proof was, this Court can be certain that the legislature knew that the burden of proof mattered and how to place it clearly. Wisconsin Statutes § 980.08(4)(b) (2004) required the court to grant the petition for supervised release "unless the state proves by clear and convincing evidence…." If the legislature had intended to switch the burden of proof onto the respondent, the legislature

knew what language to use and could have said that the burden of proof was now on the respondent. The legislature knew how to change procedures under Chapter 980 and, when making changes in the past, has explicitly limited other rights of the respondent under Chapter 980. *See* Wis. Stats. §§ 980.03, 980.031, 980.034, 980.036, 980.05. In the absence of a clear statement that changes that burden, one can reasonably assume that no change was intended.

b. Another possible reading of Section 980.08(4)(cg) is there is no burden of proof.

In addition, contrary to the view of the court of appeals, the revision of the statute could "mean that no burden is assigned; rather, the circuit court must review all of the evidence presented and make a discretionary determination as to whether supervised release is appropriate," as Rachel argued. ***Rachel***, 2010 WI App 60, ¶10. Under this reasonable theory of meaning, the new statutes removed any burden of proof and, and, as in sentencing, *see, e.g.,* ***State v. Taylor***, 2006 WI 22, ¶¶19-20, 289 Wis. 2d 34, 45, 710 N.W.2d 466 (setting forth the factors to consider at sentencing), or in the dispositional phase of a termination of parental rights proceeding, *see* Wis. Stats. §48.426 (setting forth the statutory factors to consider at a dispositional hearing in cases involving termination of parental rights) made it the responsibility of the trial judge, with the benefit of all of the information from both parties, to make a discretionary decision guided by statutory factors.

c. Reading Section 980.08(4)(cg) as placing the burden of proof on the person committed creates the absurd results.

Finally, the statute could be read as placing the burden on the person committed. In ***Rachel***, 324 Wis. 2d 465, the court of appeals erroneously reached this conclusion. In so

holding the court of appeals made much of its view that such a result followed naturally from having the circuit court, under the revised statute, "start[] in the position of having to *deny* a petition for supervised release." ***Id***., ¶9 (emphasis in original). The court also relied upon the presumption in favor of institutionalization in the statute, ***id***., ¶11, and upon the general rule that a petitioning party should bear the burden of proof, ***id***, ¶13.

But holding that the statute unambiguously places the burden of proof on the person committed ignores the larger context of the statute. Context matters because "[c]ontext is important to meaning." ***Kalal,*** 271 Wis. 2d at 663. In addition, it creates the absurd result that someone who is committed is more likely to be able to achieve discharge than to achieve supervised release. It is an axiom of statutory interpretation that statutes are to be interpreted to avoid absurd or unreasonable results. ***Id.*** at 664.

Chapter 980 has provisions that create both the potential for supervised release and for discharge. Supervised release is an interim step between commitment and discharge which was placed into the statute because "if a person's interests in liberty requires that they not be confined in the most secure setting if their treatment needs can be met in some less secure settings." Drafter's Note, Legislative Reference Bureau-2975/P2. Thus, supervised release was intended as a less secure setting than institutional care and a more restrictive setting than discharge.

If the state and court of appeals are correct that the burden of proof is on the person committed, *see* ***Rachel***, 324 Wis. 2d 465, then those committed will be able to obtain discharge more readily than supervised release. But the court of appeals did not address this problem. *See* ***id***.

A person must be discharged if the state does not prove by clear and convincing evidence that the person, among other things, is dangerous because his or her mental

disorder "makes it likely that he or she will engage in acts of sexual violence." Wis. Stats. § 980.09(3); *see generally* § 980.02(2)(c). Discharge occurs under § 980.09(3) regardless of the reason that the state cannot prove the dangerousness. Thus, for example, discharge can occur even if a person has not participated in treatment and the person's dangerousness simply has abated on its own.

But, under the state's theory as to burden of proof, if a untreated person for whom the state could not meet the burden as to dangerousness were to petition for supervised release for some reason, rather than for discharge, the person would not be able to obtain supervised release. Although the person likely would be able to prove it "is substantially probable that the person will not engage in an act of sexual violence while on supervised release," *see* Wis. Stats. § 980.08(4)(cg)(2), the person could not establish that he had "made significant progress in treatment…," *see id*. § 980.08(4)(cg)(1). Surely the legislature could not reasonably have intended to make it more likely that someone would obtain discharge and a totally unsupervised release into society more easily than that the person would obtain supervised release into society, along with the possibility of revocation if there are any problems, *see id*. § 980.08(7). Given the absurdity of this result, it is less likely that the legislature intended the burden of proof to shift because the court "starts in the position of having to *deny* a petition for supervised release." ***Rachel***, 2010 WI App 60, ¶9 (emphasis in original).

Thus, because Wisconsin Statutes § 980.08(4)(cg) is capable of reasonably being read on its face three different ways, the statute is ambiguous.

2. The scope, history, and context of Section 980.08(4)(cg) support the interpretation that the burden of proof remains on the state.

When a statute is ambiguous, appellate courts may consider other evidence of legislative intent. ***In re P.A.K.***, 119 Wis. 2d 871, 878-79, 350 N.W.2d 677 (1984). In such instances, this Court must look to the scope, history, context, subject matter, and object of the statute. *See* ***State v. Jones***, 226 Wis. 2d 565, 574, 594 N.W.2d 738 (1999).

The scope and context of the statutory language demonstrate that the legislature intended the burden of proof to remain with the state. The list of items which must be proven includes items which only the state is in a position to prove or disprove. Two of the criteria which must be proven before supervised release is authorized involve information which is in the hands of the state and not accessible to the person committed under Chapter 980. One of these criteria is that "[t]reatment that meets the person's need and a qualified provider of the treatment are reasonably available." Wis. Stats. §980.08(4)(cg)(3). The other is that there is "[a] reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required…." *Id*. §980.08(4)(cg)(5).

There are no legislative drafting records or other documents from the legislature that explain the change in the statute. The history of enactment itself consists of a comparison of the earlier statute with the new one. That history suggests that the burden of proof remains on the state. The prior statute, Wis. Stats. §980.08(4)(b)(2)(2004) specifically placed the burden of proof on the state. The legislature therefore clearly was aware of the burden of proof. The legislature was on notice that, if it wanted to change the burden of proof, it should do so explicitly. Nevertheless, Wisconsin Statutes §980.08(4)(cg) does not contain any language which specifically places the burden of proof on the person committed or anyone else. Moreover, Wis. Stats. §980.08(4)(cg) speaks in terms of what must be proved rather than who must prove it or by what standard. If the removal of specific language placing the burden of proof on the state

shifts the burden to the person then, by the same logic, the removal of a specific language setting the burden of proof at "clear and convincing evidence" could have changed that burden of proof to the level of "preponderance of the evidence." The state has not suggested that such a change has taken place.

3. The factors courts consider when placing the burden of proof also support the interpretation that the burden of proof in Section 980.08(4)(cg) remains on the state.

The factors set forth in ***State v. McFarren***, 62 Wis. 2d 492, 499-500, 215 N.W.2d 459 (1974), do not suggest a different result. In ***McFarren***, ***id***., this Court set forth five factors to consider when allocating a burden of proof: (1) the natural tendency to place the burden on the party desiring change; (2) special policy considerations such as those disfavoring certain defenses; (3) convenience; (4) fairness; and (5) the judicial estimate of probability.

As a general matter, placing the burden on the party desiring change comes from a belief that the party seeking change "naturally should be expected to bear the risk of failure of proof," ***id***. at 499, but the risks of failure of proof when a person is committed differ because of the societal values involved. Commitment is a "significant deprivation of liberty," ***C.S. v. Racine County***, 137 Wis. 2d 217, 224, 404 N.W.2d 79 (1986), and the choice of location in which curtailment of liberty matters, ***Vitek v. Jones***, 445 U.S. 480, 491-92 (1979) (commitment in a mental institution is a greater curtailment of liberty than being in prison). The high value our society places on liberty, *see, e.g.,* U.S. const. amends xiv; Wis. const. art. I §8, means that, in this setting, the party seeking the more restrictive environment should bear the risk of the failure of proof. In other words, the burden of proof should remain on the state.

Constitutional considerations also support placing the burden of proof on the state. *See* pages 13-20 of this brief *infra*. Just as penal statutes are subjected to strict construction so as to safeguard the rights of defendants, ***State v. Kittilstad***, 231 Wis. 2d 245, 266, 603 N.W.2d 732 (1999), so too commitment statutes should be subjected to strict construction so as to safeguard the rights of those committed because, in both instances, liberty interests are at stake. The right to freedom from commitment gets legal protection under the Constitution. S*ee* ***Vitek v. Jones***, 445 U.S. at 491-92. In this situation, in which the state is advocating for continued restrictions on that freedom, that societal value favoring freedom becomes a reason from placing the burden of proof on the state which seeks to prevent release.

The special policy considerations inherent in restricting liberty militate in favor of placing the burden of proof on the state. Not surprisingly, in other situations when commitment is involved, the law generally has assigned the burden of persuasion on issues of release to the government.[2] ***State v. Randall***, 192 Wis. 2d 800, 808, 822, 532, N.W.2d 94 (1995); ***State v. Gebarski***, 90 Wis. 2d 754, 757, 280 N.W.2d 672 (1979). Similarly, when someone committed under Chapter 980 files a petition for discharge, the burden of proof

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[2] In cases involving commitment under Chapter 51, transfer from a more restrictive facility to a less restrictive facility generally does not require a court hearing, *see* Wis. Stats. § 51.31(1)(e). If the transfer is from a less restrictive facility to a more restrictive facility, the state must prove by a preponderance of the evidence that the treatment resulting is the transfer is "least restrictive of the patient's personal liberty, consistent with the treatment needs of the patient and that the patient violated a condition of a transfer to less restrictive treatment." ***Id***. The hearing occurs before a hearing officer. ***Id***.

In cases involving commitment under Chapter 55, transfer between placements does not require a hearing unless there is an objection. *See* ***id***. § 55.15(6). If a transfer is challenged, there is no burden of proof. ***Id***. § 55.15(8). Instead, the court must find that several factors are met. ***Id***.

rests with the state, even though the person committed is the moving party. Wis. Stats. §980.09(3) & (4).

Neither convenience nor fairness warrant removing the burden of proof from the state. In the absence of explicit language, this Court should not read into the statute a requirement that Mr. West prove criteria for which the information is not only in the hands of the state but which the state easily manipulates.[3]

The state controls what resources are "reasonably available" because the State Department of Health and Family Services manages and funds supervised release services. Wis. Stats. §980.08.12; *see* ***State v. Morford***, 2006 WI App 229 ¶5, 297 Wis. 2d 339, 345, 724 N.W.2d 916. The Department of Health and Family Services is responsible not only for treatment but also for providing housing to persons on supervised release. ***Id***. at 355-56. If the question were only whether treatment was available, an expert for Mr. West might be on equal footing with the state in providing such proof. But, as the state fails to note, the statute requires proof that treatment is "reasonably available" and reasonably available often is a matter of management of funds and resources. *See* Wis. Stats. §980.08(12); *see also* ***Morford***, 297 Wis. 2d at 345. Requiring Mr. West and other persons seeking supervised release to find experts on budgeting as well as experts on generalized treatment is unreasonable, especially as the statutes provide for court appointment of an examiner, *see* Wis. Stats §980.07(1), rather than of experts on state budgets.

Yet, although the key information needed to prove these criteria is in the hands of the state, there is no provision in Chapter 980 which requires the state to make the requisite

[3] Although there is a difference between the prosecutors who opposed supervised release and the department, the practical reality is that the department will cooperate with the prosecutors far more readily than with its involuntarily-committed patients.

information available to the person committed. Wisconsin Statutes §980.036(2), which requires the prosecuting attorney to turn over certain information to the person who is committed, does not require the turning over of information concerning resources which are available, might be available, or could be made available for treatment and residential purposes to a person on supervised release. Wisconsin Statutes §980.036(2) also does not require the turning over of budget information or other similar information.

Moreover, placing the burden of proof on the respondent requires him to prove a negative. The respondent would have to prove that it was substantially probable that "he will not engage in an act of sexual violence while on supervised release." Wis. Stats. §980.08(4)(cg)(2). The Wisconsin Supreme Court, in placing burdens of proof, has previously factored in such "practical considerations" as requiring one party to prove a negative as a reason for placing the burden of proof on the other party. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 233-236, 548 N.W.2d 69 (1996) (discussing allocation of burdens of proof in ineffective assistance of counsel claims).

B. The Burden of Proof Remains with the State to Avoid Having Section 980.08(4)(cg) Violate the Constitutional Right of Persons Committed Under Chapter 980.

Courts attempt to interpret statutes to avoid constitutional infirmities. ***State v. Stenklyft***, 2005 WI 71, 281 Wis. 2d 484, 495, 697 N.W.2d 769. This need provides an additional reason for this Court to interpret Wisconsin Statutes §980.08(4)(cg) as placing the burden of proof on the state. This Court should do so to avoid constitutional infirmities under the due process and equal protection clauses of the federal and state constitutions.

1. The burden of proof remains with the state to avoid having section 980.08(4)(cg) violate due process.

Wisconsin Statutes §980.08(4)(cg) places the burden of proof on the state because doing otherwise violates principles of due process. Due process requires that a person not be held to involuntary commitment without due process. *See* U.S. const. amends. v, xiv; Wis. const. art. I §8. "Freedom from involuntary commitment is an interest protected by the due process clause" and civil commitment of any type is a "'significant deprivation of liberty that requires due process protection.'" ***C.S. v. Racine County*****,** 137 Wis. 2d 217, 224, 404 N.W.2d 79 (1986) (quoting ***Addington v. Texas***, 441 U.S. 418, 425 (1979)). Commitment within a mental institution involves a "massive curtailment of liberty," which is greater than being placed in prison. ***Vitek v. Jones***, 445 U.S. 480, 491-92 (1979).

The person committed should not have the burden of to prove he should be released from continued confinement because placing the burden on him offends due process. Thus, in ***Foucha v. Louisiana***, 504 U.S. 71 (1992), the United States Supreme Court held that a Louisiana statute violated the due process clause because it barred the release of committed insanity-defense acquittees unless they met the burden of proof of showing that they were not dangerous, regardless of whether they were actually and actively mentally ill. In reaching this holding, the Court distinguished the Louisiana scheme from a pretrial detention scheme in ***United States v. Salerno*****,** 481 U.S. 739 (1987), which also was based upon dangerousness. The Court noted that persons committed in Louisiana, unlike persons detained prior to trial, were not entitled to a hearing at which the state had the burden of proof on present dangerousness. ***Foucha***, 504 U.S. at 81. As the United States Supreme Court said:

> Under the state statue, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.

***Id.*** at 81-82. This distinction was key because the placing of the burden of proof on Foucha allowed him to be held even though "no doctor or any other person" testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. ***Id.*** at 82.

Similarly, if Wisconsin Statutes §980.08(4)(cg) is interpreted to place the burden of proof on Mr. West and others committed under Chapter 980, the statute violates due process. As with the statute in ***Foucha*****,** 504 U.S. at 81-82, placing the burden of proof on those committed would allow people to continue to be institutionalized even if no doctor or any other person testified positively that the person would be a danger to the community and even if no one gave the basis for such an opinion.

If the constitutionality of Wisconsin Statutes §980.08(4)(cg) were challenged, strict scrutiny would apply. ***State v. Post*****,** 197 Wis. 2d 279, 302, 541 N.W.2d 115 (1995). Although the state has a "compelling interest in protecting society by preventing future acts of sexual violence through commitment and treatment…," ***id.*** at 294, placing the burden of proof for supervised release on those committed is not narrowly tailored to address this state interest. The placing of the burden of proof on the person committed does not enhance either safety or treatment as doing so would allow such placement even if no expert believed or testified that continued institutionalization was the best route to safety and treatment.

An additional aspect of due process is that the standards of proof reflect both the value placed on individual liberty and the desire "to minimize the risk of erroneous decisions." ***Addington*****,** 441 U.S. at 425. As the United States Supreme Court has stated, an "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." ***Addington*****,** 441 U.S. at 427. Thus, for example, within the realm of commitment, a preponderance of the evidence standard is insufficient to satisfy due process. ***Id***.

Similarly, requiring the burden of proof to be on the state to continue institutional care reflects the underlying values that are in play. If the statute is read to shift the burden of proof to the person committed, at a minimum, the risk of error will be alarmingly high, given that the information necessary to meet that burden of proof is in the hands of state actors who are under no obligation to share it. Moreover, even though a serious liberty interest is at stake, placing the burden on the person committed fails to reflect the values of liberty in that it places the burden of error on the individual whose liberty interests are at stake.

As a practical matter, "[i]n all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." ***Speiser v. Randall***, 357 U.S. 513, 525 (1958). For this reason, the burden of proof is placed on the other party when "one party has at stake an interest of transcending value." ***Id.*** Doing so, causes reduction of the margin of error as to that party. ***Id.*** Thus, for example, the United States Supreme Court has held that the burden of proof in a criminal case must be on the state. But the requirement that the burden of proof be placed on the state can go beyond criminal law. In ***Speiser v. Randall*****,** the Court also ruled that the burden of proof in a tax case must remain with the state if the question is whether a person is eligible for a tax exemption based upon loyalty to the state. ***Id.*** at 526. The Court reached this result

based upon a weighing of the interests, including the constitutional right to free speech. ***Id***.

As in ***Speiser***, 357 U.S. at 525, in the situation at bar, Mr. West's liberty interest is of constitutional dimension, ***C.S. v. Racine County***, 137 Wis. 2d at 224, and therefore of "transcending" value. To place the burden of proof on the state instead of on Mr. West therefore minimizes the margin of error as to the liberty interest.

2. The burden of proof remains with the state to avoid having section 980.08(4)(cg) violate the equal protection clause.

Wisconsin Statutes §980.08(4)(cg) places the burden of proof on the state because doing otherwise violates principles of equal protection. The equal protection clause guarantees that similarly situated people be according similar treatment. ***State v. Avila*****,** 192 Wis. 2d 870, 879-80, 532 N.W.2d 432 (1995). A party challenging the statute as so interpreted on equal protection grounds would have to "demonstrate that the state unconstitutionally treats members of similarly situated classes differently." ***Post*****,** 197 Wis. 2d at 318. This Court long ago held that persons committed under Chapter 980 and persons committed under Chapter 51 are similarly situated. ***Id***. at 318-19. Others who are committed and are therefore similarly situated include those committed under Wisconsin Statutes §971.17 because they were found not guilty by reason of mental disease or defect and those found not competent to proceed to trial pursuant to Wisconsin Statutes §971.14.

For those committed under Chapter 51, those committed in criminal cases as incompetent, and those committed following a verdict of not guilty by reason of mental disease or defect, the burden of proof is on the party who originally sought commitment when release or modification is sought to prove that such release or

modification is not appropriate. Wis. Stats. §§51.20(16)(a) & (d), 51.20(13)(g)(3) (Chapter 51); ***id.*** §971.14(5) (incompetence in criminal cases); ***id.*** §971.17(4)(d) (not guilty by reason of mental disease or defect). Thus, there clearly is a difference in statutory treatment between those committed under Chapter 980 who are seeking supervised release into the community and those committed under other statutes who are seeking release into the community with supervision.

In determining whether a statute violates the equal protection clause, the court must first decide what level of scrutiny to use. ***State v. Lynch***, 2006 WI App 231 ¶12, 297 Wis. 2d 51, 61, 724 N.W.2d 656, *rev. denied*, 2007 WI 59, 299 Wis. 2d 326, 731 N.W.2d 636. The highest level of scrutiny, "strict scrutiny," applies when the statute or classification "'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" ***Ferdon v. Wisconsin Patients Compensation Fund***, 2005 WI 125 ¶61, 284 Wis. 2d 573, 605, 701 N.W.2d 440 (citations omitted). Under strict scrutiny, a statute violates equal protection unless the state can prove that the classification "is precisely tailored to promote a compelling governmental interest." ***Lynch***, 297 Wis. 2d at 61. The other primary type of scrutiny is the "rational basis" standard.[4] ***Id***. Under "rational basis" scrutiny, the courts determine "whether there exists any rational basis to justify the classification." ***Avila,*** 192 Wis. 2d at 880.

The courts of this state have not determined the level of scrutiny used to analyze whether portions of Chapter 980 violate equal protection. ***Post***, 197 Wis. 2d at 319-21. Nevertheless, this Court should apply strict scrutiny. A

[4] There also is an intermediate level of scrutiny but that level of scrutiny applies "only in limited circumstances when the legislation is not facially invidious but "nonetheless gives rise to recurring constitutional difficulties." *See* ***Post***, 197 Wis. 2d at 320-21 (citing ***Plyler v. Doe***, 457 U.S. 202, 217 (1982)).

statutory classification is subject to strict scrutiny when it impinges on a fundamental right, ***State ex rel. Watts v. Combined Community Services***, 122 Wis. 2d 65, 81 n.8, 362 N.W.2d 104 (1985); ***In re Hezzie R.***, 219 Wis. 2d 848, 894, 580 N.W.2d 660 (1998), and liberty is a fundamental right, *see* ***Foucha***, 504 U.S. at 86 (plurality opinion).

The purposes behind the enactment of Chapter 980 are the protection of the public and the treatment of the person committed. ***Post,*** 197 Wis. 2d at 321, 330. Similarly, the public may need protection from those committed under Chapter 51, Wisconsin Statutes §971.14, and Wisconsin Statutes §971.17. Although some persons committed under Chapter 51 may be dangerous only to themselves, *see, e.g*, Wis. Stats. §51.20(1)(a)(2)(a), other persons committed under Chapter 51 will have engaged in "recent homicidal or other violent behavior," *see, e.g.,* ***id.*** §51.20(a)(2)(b). Those committed under Wisconsin Statutes §971.14 will have been accused of committing a crime, which could include homicide, battery, sexual assault, or other violent behavior. Those committed under Wisconsin Statutes §971.17 will have admitted to committing a crime, including perhaps homicide, battery, sexual assault, or other violent behavior, but found not to be guilty by reason of mental disease or defect.

The persons committed under each of these statutes also will be persons in need of treatment. The purpose of involuntary commitment under Chapter 51 *is* treatment. Wis. Stats. §51.20 ("Involuntary commitment for treatment"). Those committed under Wisconsin Statutes §971.14 must be discharged (and perhaps committed under some other statutory provision) when treatment will be of no particular avail. Wis. Stats. §971.14(6). In addition, in placing people committed under §971.17, courts are to consider the availability of treatment. Wis. Stats. §971.17(3).

The question then become whether shifting the burden of proof for release to the person committed rather than to the state is strictly tailored to these goals for those committed

under Chapter 980, especially when shifting the burden of proof is deemed unnecessary for any other persons committed. The respondent has no access to the information necessary to prove such items as whether "[t]reatment that meets the person's need and a qualified provider of the treatment [is] reasonably available," Wis. Stats. §980.08(4)(cg)(3), and whether there is "[a] reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required…," ***id.*** §980.08(4)(cg)(5). Release, when such treatment and resources are available, serves the goals of protection of the public and treatment. Refusing such release because the respondent cannot prove these items due to lack of access to information does not serve the goals of either protection of the public or treatment. Thus, the shift in the burden of proof to the committed person can serve no legitimate purpose and renders supervised release a mirage.

## CONCLUSION

This Court therefore should vacate the order denying supervised release and should remand the matter to the trial court with directions to hold a new hearing at which the burden of proof is placed on the state.

Dated this __ day of February, 2011.

Respectfully submitted,

_____

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,971 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ___ day of February, 2011.

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# CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 10, 2010**

A. John Voelker
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1579 Cir. Ct. No. 1997CI970001

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

---

IN RE THE COMMITMENT OF EDWIN C. WEST:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

EDWIN CLARENCE WEST,

RESPONDENT-APPELLANT.



---

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Edwin Clarence West was committed as a sexually violent person in 1997. On April 18, 2008, West filed a petition for supervised

release. The circuit court denied West's petition. On appeal, West contends that the circuit court incorrectly assigned the burden of proof under WIS. STAT. § 980.08(4)(cg) and that by doing so, the circuit court violated West's Due Process and Equal Protection rights. Because we rejected identical arguments in *State v. Rachel*, 2010 WI App 60, 324 Wis. 2d 465, 782 N.W.2d 443, we affirm.

¶2 Prior to August 1, 2006, when faced with a petition for supervised release, the circuit court was required to "grant the petition unless the state proves by clear and convincing evidence" either "[t]hat it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care" or "[t]hat the person has not demonstrated significant progress in his or her treatment or the person has refused treatment." WIS. STAT. § 980.08(4)(b). Under that statute, the State bore the burden of proof, "by clear and convincing evidence that the person is still a sexually violent person and that it is substantially probable that the person will engage in acts of sexual violence if the person is not continued in institutional care." *State v. Brown*, 2005 WI 29, ¶11, 279 Wis. 2d 102, 109, 693 N.W.2d 715, 718.

¶3 2005 Wis. Act 434 extensively revised WIS. STAT. ch. 980, and a circuit court is now guided by WIS. STAT. § 980.08(4)(cg) when deciding a

petition for supervised release.[1] Under that statute, the court "may not authorize supervised release unless, based on all of the reports, trial records, and evidence presented, the court finds that all" of the five enumerated criteria are met. *See* ***Rachel***, 2010 WI App 60, ¶9, 324 Wis. 2d at 471–472, 782 N.W.2d at 446 (emphasis omitted).

---

[1] In ***State v. Arends***, 2010 WI 46, __ Wis. 2d __, __ N.W.2d __, the supreme court considered how the revisions to WIS. STAT. ch. 980 affected the procedures when a committed person filed a petition for discharge under WIS. STAT. § 980.09. In that case, the supreme court held that under § 980.09(1), the circuit court first "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." ***Arends***, 2010 WI 46, ¶4, __ Wis. 2d at __, __ N.W.2d at __. "The clear purpose of [this] review is to weed out meritless and unsupported petitions." *Id.*, 2010 WI 46, ¶28, __ Wis. 2d at __, __ N.W.2d at __.

If the petition alleges sufficient facts, the circuit court then conducts the review called for by WIS. STAT. § 980.09(2). That review is a "limited review of the sufficiency of the evidence." *Id.*, 2010 WI 46, ¶43, __ Wis. 2d at __, __ N.W.2d at __.

> The [circuit] court is required to review the items specifically enumerated [in § 980.09(2)] if available, and may order those items to be produced and/or conduct a hearing at its discretion. The circuit court must determine whether the enumerated items 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. If any facts support a finding in favor of the petitioner, the [circuit] court must order a discharge hearing on the petition; if no such facts exist, the court must deny the petition.

*Ibid.* The supreme court further held that "[t]he 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.*, 2010 WI 46, ¶41, __ Wis. 2d at __, __ N.W.2d at __.

A person committed under ch. 980 who wishes to secure his or her release may either file a petition for supervised release under WIS. STAT. § 980.08 or file a petition for discharge under WIS. STAT. § 980.09. ***Arends***, 2010 WI 46, ¶17, __ Wis. 2d at __, __ N.W.2d at __. West chose to file a petition for supervised release, and, therefore, this court's opinion in *Rachel*, addressing § 980.08, is applicable.

¶4 West argues that the change in the statutory language did not shift the burden of proof from the State. He further argues that WIS. STAT. § 980.08(4)(cg) would violate Due Process and Equal Protection if the burden of proof rested with the person seeking a supervised release. Both of West's arguments were rejected by this court in *Rachel*.

¶5 In that case, we noted that WIS. STAT. § 980.08(4)(cg) "begins by directing the court to deny supervised release unless certain criteria are present" and "sets forth five criteria that must be demonstrated to overcome the presumption of institutionalization." *Rachel*, 2010 WI App 60, ¶11, 324 Wis. 2d at 473, 782 N.W.2d at 447. Thus, while the statute is silent as to which party bears the burden of proof, "[i]t would be impractical, if not absurd, to place the burden on the State to demonstrate factors weighing in favor of release because the State has no incentive to do so." *Id.*, 2010 WI App 60, ¶12, 324 Wis. 2d at 473–474, 782 N.W.2d at 447. We held that "the plain language employed by the legislature convinces us that the burden of proof now rests on the petitioner to show that the five statutory criteria are met." *Id.*, 2010 WI App 60, ¶16, 324 Wis. 2d at 476, 782 N.W.2d at 448.

¶6 We also rejected the argument that the statutory change rendered WIS. STAT. ch. 980 unconstitutional. We observed that "the constitutionality of [ch. 980] relies on procedures for periodic review of a commitment order," and that "nothing in the revised statute has changed the requirement for periodic review." *Rachel*, 2010 WI App 60, ¶¶15, 16, 324 Wis. 2d at 475–476, 782 N.W.2d at 447, 448. Therefore, we held that "the constitutionality of the commitment scheme [wa]s not disturbed" by the amendment of WIS. STAT. § 980.08(4). *Rachel*, 2010 WI App 60, ¶16, 324 Wis. 2d at 476 782 N.W.2d at 448.

¶7 Our opinion in ***Rachel*** controls this appeal, and, therefore, we affirm the circuit court order denying West's petition for supervised release.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 2
Honorable Judge M. Joseph Donald

In Re: The Commitment of Edwin West

STATE OF WISCONSIN,
Plaintiff,

v.

EDWIN WEST,
Respondent.

FILED
CRIMINAL DIVISION
BR 2
NOV 17 2008
BR 2
JOHN BARRETT
Clerk of Circuit Court

Case Number 97 CI 01

## ORDER DENYING PETITION FOR SUPERVISED RELEASE

The Respondent is a patient committed as a sexually violent person under Chapter 980 of the Wisconsin Statutes. As part of that commitment, the Respondent is subject to a periodic re-examination of his mental condition. In connection to a recent re-examination, the Respondent has petitioned the court for supervised release pursuant to Wis. Stats. §980.075 and §980.08.

After hearings held on August 1, 2008, September 3, 2008 and October 10, 2008, the court denies the Respondent's Petition for supervised release.

Dated November 17, 2008

The Honorable Judge M. Joseph Donald
Branch 2
Milwaukee County Circuit Court

RECEIVED
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STATE PUBLIC DEFENDER
MADISON APPELLATE

RECEIVED
NOV 17 2008
Office of District Attorney
Milwaukee, WI 53233

THE COURT: All right. Maybe she just stepped away from the phone. All right. Well, at this point, we still need to address the burden issue. So I will also indicate that, Miss Bunch, that you did at least file an update or at least an issue with respect to the discovery, initial discovery demand or the discovery procedures, and you feel that the civil discovery procedures are not available to the respondent? Is that correct?

MS. BUNCH: With respect to the burden shift issue?

THE COURT: Yes.

MS. BUNCH: No, sir. We filed a brief concerning the State's interpretation of the changes at 434 which were effective in 2005 that shifted the burden to the respondent in these matters.

THE COURT: All right. Well, let me proceed this way then. Let me just hear brief argument. If parties wish to make additional argument, then I will rule on that.

MS. BUNCH: Well, Your Honor, the State's position is very simple. At 434 modified Section 980.08(4) of the Wisconsin Statutes to read that the Court may not authorize supervised release

unless all of five criteria have been met. And the statute is quite clear that the new language shifts the burden of proof to the respondent, and the language in that 434 is unambiguous with respect to that.

The suggestion raised by this respondent and others who have addressed this issue claim that the required criteria would be impossible to meet. We disagree with that proposition. We think that that is incorrect. We do know, however, that contrary to the information that was provided in Miss Wakefield's report on page 29, both the standard of law, as was erroneously related by Miss Wakefield, has changed, and the definition of significant progress and treatment as set forth in now Section 980.01(8). Miss Wakefield indicates that there was no legal definition for the terms "significant progress and treatment." That is incorrect. There is, and it's codified in Section 980.01(8).

Judge, we believe that our brief is complete with respect to the burden-shift issue. I would note for this record that courts in Milwaukee County have ruled favorably for the State in such matters in the past, recent past. There is nothing

that has been suggested in this case that would change the State's position.

THE COURT: All right.

Mr. Opland-Dobs.

MR. OPLAND-DOBS: Judge, our brief lays out exactly what our argument is. And this is a new change in the law, still relatively new, and one that has not been decided by any appellate court at this point.

Our argument in short is that the new statutes don't explicitly shift the burden, and if they -- If it is interpreted as that was their intention, then that would be an illogical and absurd result considering the constitutional violations that that would create, the violation of his right to due process and equal protection as laid out in our brief.

I think we can -- I will address Miss Wakefield's opinion with her testimony.

THE COURT: All right. With respect to the burden in this matter, given the change in the law, and this Court, I do find that the language of the statute is clear, in that, it does switch or at least change the burden to the respondent in this matter with respect to meeting those conditions for

supervised release. Statutes are presumed constitutional, and when the Court takes the plain, ordinary meaning of the new statute, the Court -- the new language which states that the Court may not authorize release unless, and then those conditions must be met by the -- logically must be met by the respondent; otherwise, the State, in this case it would not make any sense to say that somehow the State has to establish that the conditions have not been met.

So at this time, the Court finds that the burden in this matter does shift to the respondent, and that it is not a violation of due process or equal protection, in that, the respondent can obtain information with respect to whether or not the respondent has met those conditions through means of discovery, and I do not find that it is an impossible burden for the respondent to meet. And therefore, the Court at this time indicates that the burden has switched to the respondent.

With that finding, Mr. Opland-Dobs, are you prepared to call your first witness?

OPLAND-DOBS: I am, if Miss Wakefield is on the phone.

STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP1579

IN RE COMMITMENT OF EDWIN C. WEST:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EDWIN C. WEST,

RESPONDENT-APPELLANT-PETITIONER.

REVIEW OF A COURT OF APPEALS', DISTRICT I, DECISION AFFIRMING AN ORDER DENYING A PETITION FOR SUPERVISED RELEASE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE M. JOSEPH DONALD, PRESIDING

# BRIEF OF THE PETITIONER-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP1579

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IN RE COMMITMENT OF EDWIN C. WEST:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EDWIN C. WEST,

RESPONDENT-APPELLANT-PETITIONER.

---

REVIEW OF A COURT OF APPEALS', DISTRICT I, DECISION AFFIRMING AN ORDER DENYING A PETITION FOR SUPERVISED RELEASE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE M. JOSEPH DONALD, PRESIDING

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# BRIEF OF THE PETITIONER-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate.

## STATEMENT OF THE CASE

West was committed as a sexually violent person in 1997 (12). On May 1, 2008, West filed a petition for supervised release (94). The circuit court denied West's petition (126). *In re Commitment of West,* No. 2009AP1579, slip op. at 1-2 (Wis. Ct. App. Aug. 10, 2010). The circuit court interpreted Wis. Stat. § 980.08(4)(cg) as placing the burden of proof on him (122:5-8); *id.* at 2. The court of appeals affirmed relying on *In re Commitment of Rachel (Rachel II)*, 2010 WI App 60, 324 Wis. 2d 465, 782 N.W.2d 443, which rejected identical claims. *See Cook v. Cook,* 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

## STANDARD OF REVIEW

This case requires the Court to interpret the language of Wis. Stat. § 980.08. Statutory interpretation is a question of law that appellate courts review *de novo* but benefiting from the lower court's analyses. *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶ 14, 310 Wis. 2d 456, 750 N.W.2d 900. Determinations of who has the ultimate burden of proof and whether that party has satisfied the requisite burden of proof are questions of law. *State v. Lopez*, 2001 WI App 265, ¶12, 249 Wis. 2d 44, 637 N.W.2d 468.

## ARGUMENT

### I. WEST BEARS THE BURDEN OF DEMONSTRATING THAT HE MEETS CRITERIA FOR SUPERVISED RELEASE.

West argues that both the circuit court and the court of appeals incorrectly interpreted Wis. Stat. § 980.08, when the circuit court held West bore the burden of proof[1] at his supervised release hearing (122:7-8), and the court of appeals affirmed the circuit court's holding. As West notes, the current relevant statutory provisions are Wis. Stat. § 980.08(4)(c) and (cg). The State agrees that since neither of those paragraphs nor any other part of § 980.08 explicitly mentions a burden of proof, the statute can be reasonably interpreted to place the burden on either party. It is, therefore ambiguous. *Hermax Carpet Marts v. Labor & Industry Review Comm'n,* 220 Wis. 2d 611, 621, 583 N.W.2d 662 (Ct. App. 1998) (A "statutory provision is ambiguous if reasonable minds could differ as to its meaning.").

While Wis. Stat. § 980.08, does not explicitly place on West the burden of proving that he meets the criteria for supervised release as a sexually violent person, a reading of Wis. Stat. § 980.08's plain language in context and the history of the statute lead to that conclusion.

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[1] "The . . . 'burden of proof' has two aspects: the burden of producing some probative evidence on a particular issue, and the burden of persuading the fact finder with respect to that issue." *State v. Velez*, 224 Wis. 2d 1, 15-16, 589 N.W.2d 9 (1999). Throughout this brief, the State's references to the burden of proof include both aspects. It will distinguish between the burden of production and the burden of persuasion where necessary.

Wisconsin Stat. § 980.08(4)(cg) provides;

> [t]he court *may not authorize supervised release unless* . . . the court finds that all of the following criteria are met:
>
> 1. The person has made 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.

Because the statute is ambiguous, this court may look to the legislative history.

Wisconsin Stat. § 980.08(4)(b) (2003-04) (repealed 2005 Wis. Act 434 § 116), previously explicitly provided a burden of proof and the level of proof:

> (b) The court shall grant the petition unless the state proves by clear and convincing evidence one of the following:
> 1. That it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care.

> 2. That the person has not demonstrated significant progress in his or her treatment or the person has refused treatment.

The burden of proof contained in the 2003-2004 version of the statute traces back to the original version of Ch. 980. *See* Wis. Stat. § 980.08(4) (1993-94):

> The court shall grant the petition unless the state proves by clear and convincing evidence that the person is still a sexually violent person and that it is still substantially probable that the person will engage in acts of sexual violence if the person is not confined in a secure mental health unit or facility.

All of these former versions of the supervised release statute placed the burden of proof on the State and set the level of that proof. The circuit court's default was to grant a petition for supervised release unless the State proved § 980.08(4)(b)'s requirements to the statutorily mandated level. The latest legislative change, 2005 Wis. Act 434, was the first departure from the language placing the burden of proof on the State in over a decade.

West acknowledges this change but insists that the removal of the language placing a burden of proof on the State had no effect. The burden of proof remains, West claims, on the State. According to West, if the Legislature had intended to switch the burden of proof onto the respondent, it would have explicitly done so. West's brief at 8-10.

It is far more likely that the Legislature removed the language placing the burden of proof on the State in order to shift the burden established in § 980.08(4)(b) (2003-04), to the

sexually violent person. If the Legislature wanted the burden of proof to remain with the State, why change § 980.08(4)'s language at all. It would have been much simpler to leave the language untouched as it had on eight previous occasions. *See* 1995 Act 276; 1997 Act 27; 1997 Act 275; 1997 Act 284; 1999 Act 9, §§ 3223L, 3232p-3238d; 1999 Act 32; 2001 Act 16; 2003 Act 187.

West suggests that perhaps Rachel's argument that there is no burden, *see Rachel II*, 324 Wis. 2d 465, ¶ 10, is a possibility. West's brief at 6. The idea of no burden is an attractive one at first blush. But on more detailed analysis, it fails as to both the burden to produce evidence and the burden of persuasion.

This view ignores that the statute begins "[t]he court *may not authorize supervised release unless* . . . the court finds . . . all of the following criteria . . . ." Wis. Stat. § 980.08(4)(cg). Each of the five statutory criteria is stated in the affirmative. The five criteria listed are statutory prerequisites to a circuit court's granting a petition for supervised release. A circuit court's decision granting a sexually violent person's supervised release petition violates the statute without evidence supporting the existence of each of the statutory criteria. A circuit court can not correctly make a finding without evidentiary support in the record.

A sexually violent person has an incentive to establish the criteria of § 980.08(4)(cg), in order to enable the circuit court to make a finding and to have that finding affirmed on appeal. On the other hand, the State has no such incentive. The State could compel the circuit court's denial of a petition by simply doing nothing. As the *Rachel II* court

observed "It would be impractical, if not absurd, to place the burden on the State to demonstrate factors weighing in favor of release because the State has no incentive to do so." *Rachel II,* 324 Wis. 2d 465, ¶ 12. If a supervised release petitioner presents no evidence when the State has also presented no evidence, the court is compelled to deny the petition under Wis. Stat. § 980.08(4)(cg). By doing nothing, the State's inaction would effectively shift the burden of going forward with evidence to the sexually violent person.

The absence of a burden of proof also effectively places the burden of persuasion on the sexually violent person. If both sides present evidence which places one or more of the statutory criteria in dispute, the language prohibiting the grant of the petition without an affirmative finding that the criteria exists is tantamount to requiring the sexually violent person to persuade the circuit court that his or her version of the facts are the correct facts. Unless the person succeeds in convincing the court that facts exist to support the existence of the criteria, how can a court correctly find those criteria?

West contends that the court of appeals interpretation creates an absurd result because a committed person is more likely to be discharged than placed on supervised release. His emphasis focuses on the "significant progress in treatment" requirement of subparagraph 1 of § 980.08(4)(cg).

In most cases neither mental disorders nor dangerousness magically disappear without some intervention.[2]

West is correct that the party with the burden has a more difficult case than the opposing party. But that does not mean it is absurd to set criteria on supervised release to ensure the public's safety when releasing someone who has been adjudicated sexually violent beyond a reasonable doubt. West's premise is flawed. It is one thing to keep a sexually violent person in a secure facility in the absence of evidence the person can be safely managed in the community; quite another to keep someone who the State may no longer commit at all under any State custody. And by proceeding with a supervised release petition, West concedes he is still subject to commitment. Regardless of the outcome of the supervised release hearing, West will remain a sexually violent person in the custody of the department. Wis. Stat. § 980.08(6m) ("An order for supervised release places the person in the custody and control of the department"). It is entirely fair to place the burden of proof in a supervised release proceeding upon a person found beyond a reasonable doubt to be sexually violent, who remains more likely than not to engage in a future act of sexual violence. *See* Wis. Stat. § 980.01(6), (7).

[2] The exception to this is where, for whatever reason, the initial judgment of commitment proves flawed. That circumstance is not envisioned in Ch. 980's statutory scheme, however. That is more akin to a successful habeas corpus collateral attack on a criminal conviction. And under those circumstances release (discharge) when someone is still dangerous is not absurd; it is required.

Placement of the burden of proof upon the person petitioning for supervised release is also consistent with the general rule that a moving party bears the burden of proof. Wisconsin courts have long recognized the "customary common law rule . . . that the moving party has the burden of proof . . . ." *State v. McFarren,* 62 Wis. 2d 492, 499-500, 215 N.W.2d 459 (1974). This includes "not only the burden of going forward but also the burden of persuasion." *Id.*; s*ee also Sterlingworth Condominium Ass'n, Inc. v. Dept. Natural Res.*, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996).

West contends that *McFarren* suggests the burden be placed on the State. The *McFarren* court adopted a five-factor analysis to determine the proper allocation of burden of proof. These factors include: (1) the natural tendency to place the burden on the party desiring change; (2) special policy considerations such as those disfavoring certain defenses; (3) convenience; (4) fairness; and (5) the judicial estimate of probabilities. *Acuity Mutual Ins. Co. v. Olivas*, 2007 WI 12, ¶ 40, 298 Wis. 2d 640, 726 N.W.2d 258 citing *McFarren*, 62 Wis. 2d at 499-502.

Application of these principles in this case warrants placing the burden of proof for petitions for supervised release on the party seeking it—the sexually violent person.

First, West is the moving party, seeking a change in the status quo (community based supervised release as opposed to a secure institutional placement).

Second, West is advocating his placement on supervised release. In *Wolfe v. Wolfe*, 2000 WI App 93, ¶ 15, 234 Wis. 2d 449, 610 N.W.2d 222, the court of appeal interpreted Wis. Stat. § 767.24(4)(b) (1997-98), to determine who had the burden of proof. That section, much like § 980.08(4)(cg), provided that a child is entitled to physical contact with both parents *unless, the court finds "physical placement with a parent would endanger the child's physical, mental or emotional health."* The *Wolfe* court concluded that, although the father brought a motion seeking minimal contact, the mother had the burden of proving endangerment under the statute, because the court could not deny the father's motion unless it found endangerment, and the mother was the party advancing that position. Just so here. West is the party advancing the position that he is appropriate for supervised release. The court can not grant West's motion unless it finds West meets the criteria of § 980.08(4)(cg). This is a special policy consideration that militates in favor of assigning the burden to West.

Third, the current language of § 980.08(4)(cg), would require the State to prove negatives under an interpretation placing the burden of proof on the State. In order to read the statute to place the burden of proof on the State, this Court must insert the word "not" into paragraphs 1., 3., and 4. (*e.g.,* The person has *not* made significant progress as in the former version of the statute that expressly placed the burden on the State; treatment that meets the person's needs is *not* reasonably available; the person can *not* be reasonably expected to comply with his or her treatment requirements.).

Fourth, assignment of the burden to West does not require him to prove facts to which he has no access. West has the right to an independent expert if the assigned Department of Health Services (DHS) evaluator does not support supervised release in the annual review. Wis. Stat. § 980.07(1). Likewise, West has access to his treatment records necessary to support supervised release. West contends that Wis. Stat. § 980.036(2), does not require disclosure of information he claims is exclusively in the State's possession. He refers to information of West's treatment needs in the community, whether qualified providers are reasonably available and the reasonable level of resources to provide residential placement, supervision and treatment. West's brief at 9. But § 980.07(6) requires the department to file an "annual report comprised of the reexamination report under [§ 980.07] sub. (1) and the treatment progress report under [§ 980.07] sub. 4. The department "shall provide a copy of the annual report to the person committed under § 980.06 . . . ."

Wisconsin Stat. § 980.07(1), requires examiners conducting a reexamination under that subsection to "apply the criteria under § 980.08(4)(cg) when considering if the person should be placed on supervised release . . . [or] discharged." Wisconsin Stat. § 980.07(4), requires treating professionals to prepare a treatment progress report considering 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.

West may compel the appearance of these examiners and treatment professionals as witnesses through subpoenas. The sexually violent person may also offer to the court a wide variety of other additional information which might support supervised release. *See* Wis. Stat. § 980.08(4)(c). Most importantly, West has, as he had here, the right to counsel. *See* Wis. Stat. § 980.03(2). The defense in criminal cases regularly offers private presentence reports with summaries of proposed treatment plans and the identification of potential community treatment providers. West could have done the same here. The Sand Ridge Secure Treatment Center supervised release staff[3] is available at least by subpoena if some information in addition to that required in § 980.07 is necessary.

Fifth, the "judicial estimate of probabilities" requires a consideration of who should bear the risk of failure of proof. "The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred." *Acuity Mutual Ins. Co.*, 298 Wis. 2d 640, ¶ 48 (quoting 2 McCormick, Handbook of the Law of

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[3] West acknowledges the State and the department are not the same in chapter 980 proceedings. West suggests that "the department will cooperate with prosecutors far more readily than with its involuntarily-committed patients." West's brief at 12 n.3. There is no evidence in this record, and no other reason to believe that treatment personnel will disobey a subpoena or commit perjury to "cooperate with the prosecutors."

Evidence, § 337, at 413 (5th ed. 1999). *See also State v. Verhagen*, 198 Wis. 2d 177, 188-89, 542 N.W.2d 189 (Ct App. 1995) (because of presumption in a reverse waiver proceeding is against the transfer of jurisdiction to a juvenile court, Court of Appeals places the burden on the juvenile). Chapter 980 proceedings place the statutory preference for commitment on institutional care in a secure mental health treatment facility. Wis. Stat. §§ 980.06 and 980.065(2). From a statutory point of view, the "usual event" is the committed person will remain in such a facility until he or she is sufficiently changed to safely treat him or her in the community or to discharge the person. That view is evidenced by Wis. Stat. § 980.08(4)(cg)'s requirement that the court "may not authorize supervised release [of the committed sexually violent person] unless . . . ." The judicial estimate of the probabilities is against the person seeking supervised release. In this case, West should bear the risk of failure of proof.

Taken together, these five factors warrant placing the burden of proof on the person petitioning for supervised release.

## II. ALLOCATING THE BURDENS OF PROOF TO THE PETITIONER FOR SUPERVISED RELEASE DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS OR EQUAL PROTECTION.

West argues that an assignment of the burden of proof to him violates constitutional due process and equal protection guarantees. He does not directly claim the statute is unconstitutional but urges an interpretation, which in the State's view, is at odds with the language and history of

§ 980.08, to avoid rendering the statute constitutionally infirm. Such considerations might be special policy considerations militating against the assignment of the burden to West if those arguments actually had merit. They do not.

A court must presume that all legislative enactments are constitutional. It should resolve all doubts in favor of a statute's constitutionality. *State v. Nelson*, 2007 WI App 2, ¶ 8, 298 Wis. 2d 453, 727 N.W.2d 364 (citing *In re Commitment of Laxton*, 2002 WI 82, ¶ 8, 254 Wis. 2d 185, 647 N.W. 2d 784). Consequently, West bears the heavy burden of proving that requiring him to demonstrate that he meets criteria for supervised release is unconstitutional beyond a reasonable doubt. *Nelson*, 298 Wis. 2d 453, ¶ 8 (citing *State v. Dennis H.*, 2002 WI 104, ¶ 5, 255 Wis. 2d 359, 647 N.W.2d 851). West fails to meet this burden. His arguments are without merit.

> The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake."

*Greenholtz, v. Inmates of Nebraska Penal And Correctional Complex*, 442 U.S. 1, 7 (1979) citing *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). West does not distinguish whether his claim encompasses substantive due process, procedural due process or both.

### A. ALLOCATING THE BURDEN OF PROOF TO THE PETITIONER DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Due process has a substantive component that bars certain arbitrary wrongful government actions. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). "So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 U.S. 172 . . . (1952), or interferes with the rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-26 . . . (1937)." *United States v. Salerno*, 481 U.S. 739, 746 (1987). Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington v. Texas,* 441 U.S. 418, 425 (1979).

West cites to a series of cases claiming supervised release implicates a liberty interest, including *In re Contempt In Interest of J.S.,* 137 Wis. 2d 217, 224, 404 N.W.2d 79 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Addington*; and *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995). However, none of those cases is dispositive of the issue presented here. These cases address deprivation of a liberty interest upon initial or continued involuntary commitment, not a release from confinement where some level of security is necessary to treat West's continuing mental disorder and dangerousness.

At the initial commitment trial, the State bore the burden of proving beyond a reasonable doubt West then had a mental disorder which

rendered him dangerous. Wis. Stat. § 980.08(3). Chapter 980 affords committed persons the opportunity to seek complete discharge from their commitment order. Wis. Stat. § 980.09. In a discharge proceeding, the State bears the burden of proving by clear and convincing evidence that the committed person remains a proper subject for commitment as *Addington* and *Foucha* require. Wis. Stat. § 980.09(3).

But whether West will remain committed under ch. 980 is not at issue in a supervised release proceeding. West does not seek discharge from the commitment under § 980.09. And even if his supervised release petition is successful, he remains in the custody of DHS for control, care and treatment. Wis. Stat. § 980.08(6m). If West no longer has a mental disorder or is no longer dangerous, the State may not continue his commitment at all. An involuntarily committed person "may be held as long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 77 (1992).

What West seeks is freedom from confinement not freedom from commitment. Involuntarily commitment is broader than freedom from confinement. "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." *Jones*, 445 U.S. at 492. West equates his freedom from confinement with a liberty interest in freedom from commitment. But none of the cases West cites equates a liberty interest in freedom from commitment with freedom from confinement. To the contrary, language in several Supreme Court cases indicates that so long as West has a mental disorder and remains dangerous, he may be indefinitely *confined*.

For example, in *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court considered a commitment to a mental hospital of a person found not guilty by reason of insanity. Jones contended that, because he had been found not guilty by reason of his insanity, his indefinite commitment was unconstitutional because it did not rest upon a specific finding of mental illness and dangerousness. *See Jones*, 463 U.S. at 360. The Court held:

> [W]hen a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

*Jones*, 463 U.S. at 370. This quoted language indicates that, under the Constitution, the government is permitted to confine a person found to have a mental abnormality and to be dangerous until either he has regained his sanity or is no longer dangerous. Jones does not require some type of supervised release in the community.

In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Supreme Court observed that the State could not continue to confine a mentally ill person who was no longer dangerous. Even if the initial confinement was permissible, "it could not constitutionally continue after that basis no longer existed." *O'Connor*, 422 U.S. at 575. The *Foucha* Court observed:

> In the summary of our holdings in our opinion we stated that "the Constitution permits the Government, on the basis of [an] insanity judgment, to confine [an acquittee] to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society."

*Foucha*, 504 U.S. at 77-78.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court approved a sexually violent predator commitment statute from Kansas which did not have any supervised release component at all. The Court observed: "We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. . . . It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Hendricks*, 521 U.S. at 357 (citations omitted). Nowhere did the Supreme Court observe that Hendricks' civil commitment to a secure mental health facility was questionable under the substantive due process clause. While this question was not directly presented, the Court did have before it a substantive due process challenge.

The Supreme Court has never held that the State cannot commit that person to a secure mental health facility once it has proven a person to be mentally abnormal and dangerous. *Seling v. Young*, 531 U.S. 250, 265 (2001), generalizes the proposition this way: "due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed." *Accord Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

It is true that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). The *Youngberg* Court rejected an argument that the state must establish the "necessity" of keeping detainees in close custody; rather, they are only entitled to "the exercise of professional judgment as to the needs of residents." *Id.* at 322. West does not suggest § 980.08 deprives him of "the exercise of professional judgment."

Even if confinement alone is some lesser form of liberty interest, a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement. *Greenholtz*, 442 U.S. at 7. Such a conviction and sentence sufficiently extinguish a defendant's liberty "to empower the State to confine him in any of its prisons." *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (emphasis deleted). It is also true that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). Why shouldn't a valid civil commitment similarly extinguish any liberty interest (or not implicate due process) for mentally disordered persons who are dangerous to the extent they must establish they can be safely managed in the community?

In *In re Commitment of Post*, 197 Wis. 2d 279, 541 N.W.2d 115, this court looked at the

duration and nature of ch. 980 commitments, and determined that they were consistent with the purpose of ch. 980. *Id.* at 313. The *Post* court noted that confinement under ch. 980 permissibly balances the individual's liberty interests with the public's right to be protected from the dangers posed by those who have been proven to have a propensity toward sexual violence. *Id.* at 317.

And in *In re Commitment of Rachel (Rachel I)*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762, this court rejected a substantive due process challenge to the repeal of supervised release as a placement option at initial commitment. The *Rachel I* court wrote:

> The mere limitation of a committed person's access to supervised release does not impose a restraint to the point where it violates due process. . . . *[O]ur discussion of the "least restrictive environment" was not a holding that made a committed individual's personal ability to seek supervised release indispensable to the statute.* Rather, we recognized that the statute passes constitutional muster because the physical confinement of the individual is linked to the dangerousness of the committed person. Because there are methods in place for regularly determining the dangerousness of the person and reducing or removing the physical restrictions when the person is less or no longer dangerous, the intent of the statute is met.

*Id.* ¶ 66 (*emphasis added*). *See also*, *In re Commitment of Schulpius*, 2006 WI 1, ¶ 31, 287 Wis. 2d 44, 707 N.W.2d 495. Supervised release is within the degree of confinement imposed on West as a result of his initial commitment. Therefore, the statute may impose

on West, the burden of establishing he can be safely managed in the community.

### B. ALLOCATING THE BURDEN OF PROOF TO THE PETITIONER DOES NOT VIOLATE PROCEDURAL DUE PROCESS.

West's argument does not focus on the procedural aspect of due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

A standard analysis under procedural due process proceeds in two steps: "We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient. *Kentucky Dept. of Corrections v. Thompson*, 490 U. S. 454, 460 (1989)." *Swarthout v. Cooke*, No. 10-333, slip op. at 4 (U.S. Jan. 24, 2011).

In assessing West's liberty interest, the cases addressing criminal probation and parole are instructive. Where revocation of one already on parole or probation is at issue, the full panoply of rights due a defendant in a criminal proceeding

does not apply. *Morrissey*, 408 U.S. at 480. "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.*; *Gagnon v. Scarpelli,* 411 U.S. 778, 781-82 (1973) (same for probationers).

But an initial release on parole and revocation of parole already granted are quite different.

> There is a crucial distinction between being deprived of a [conditional] liberty one has, as in parole, and being denied a conditional liberty that one desires. The parolees in *Morrissey* (and probationers in *Gagnon*) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form the other enduring attachments of normal life." [*Morrissey*,] 408 U.S. at 482.

*Greenholtz,* 442 U.S. at 9. Thus candidates for parole "clearly must have more than an abstract need or desire for [a protectable right]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth,* 408 U.S. at 577. "The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right . . . ." *Greenholtz,* 442 U.S. at 7. Under these rules, the Legislature is free to establish the criteria for any conditional release from confinement, just as it was free to set the minimum term for discretionary parole (which

was once one quarter of the sentence). This being the case, the Legislature is free to place the burden of proof on the petitioner for release without offending procedural due process.

If one considers whether the procedures established for acquiring supervised release are constitutionally sufficient, West can not prevail. The risk of erroneous deprivation does not seem great in view of the rights § 980.08 grants West. He has the right to counsel. Wis. Stat. § 980.08(2). He has the right to retain an examiner or to have one appointed for him. Wis. Stat. § 980.07(1). As noted above, § 980.07 provides for reexaminations under that section be served on him. Wis. Stat. § 980.036 provides for discovery beyond the information in reexaminations including witnesses the State intends to call, Wis. Stat. § 980.036(2)(e), their written or recorded statements, Wis. Stat. § 980.036(2)(f), results of physical or mental examinations, results of scientific or psychological tests the State intends to offer including the underlying raw data, Wis. Stat. § 980.036(2)(h), physical or documentary evidence the State intends to offer, Wis. Stat. § 980.036(2)(i) and "exculpatory evidence," Wis. Stat. § 980.036(2)(j). West had the right to remain silent, Wis. Stat. § 980.03(2)(b), present and cross-examine witnesses, Wis. Stat. § 980.03(2)(c), and have the hearing recorded, Wis. Stat. § 980.03(2)(d).

In view of these factors, the State can properly place the burden of proof on West to demonstrate he is an appropriate risk for treatment in the community.

### C. ALLOCATING THE BURDEN OF PROOF TO THE PETITIONER DOES NOT VIOLATE EQUAL PROTECTION.

West next argues that if § 980.08(4)(cg) places the burden of proof upon him, the statute violates equal protection because other involuntary civil commitment schemes under Wisconsin law require the State to bear the burden of proof on supervised or conditional release determinations.

West's equal protection argument runs contrary to the established precedent of *In re Commitment of Williams*, 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 791. There, the court of appeals considered and rejected a similar equal protection argument involving persons committed under ch. 980, and persons committed under Wis. Stat. § 971.17 and ch. 51.[4] The equal protection

[4] In *In re Commitment of Williams*, 2001 WI App 263, ¶ 10, 249 Wis. 2d 1, 637 N.W.2d 791, the court of appeals only *assumed without deciding* that persons committed under Wis. Stat. § 971.17 and ch. 980 were similarly situated. There are, of course, significant differences. For example, the required nexus in ch. 980 of a mental disorder and is likely to commit a future act of sexual violence addresses a very different question than whether a person knows right from wrong. That is also true of the difference between whether one is sexually violent and whether one is subject to commitment under ch. 51. *See* Wis. Stat. § 51.20(1)(a)(2). Furthermore, the duration of a commitment under Wis. Stat. § 971.17, is generally finite (not exceeding two-thirds of the maximum term of imprisonment that could be imposed against an offender convicted of the same felony), and in the case of ch. 51 for a year or less, Wis. Stat. § 51.20(13)(g), whereas a ch. 980 commitment is indefinite.

argument in *Williams* involved the same modifications to the availability of supervised release at issue in *Rachel I* discussed above. The court rejected that equal protection challenge to those provisions.

The *Williams* court pointed out that it is unclear what level of scrutiny applies to equal protection analysis of statutory schemes that deprive persons of liberty interests. *Id.* ¶ 11. *Greenholtz* suggests that for one in West's position, a rational basis is sufficient. *Greenholtz,* 442 U.S. at 9-10. But the *Williams* court used the strict scrutiny standard without deciding its application. *Williams,* 249 Wis. 2d 1, ¶ 11. The court wrote:

> In the context of an equal-protection challenge, the strict-scrutiny test means that "the State must prove that the classification is necessary to promote a 'compelling governmental interest.'" *State v. Hezzie R.*, 219 Wis. 2d 848, 894, 580 N.W.2d 660, 667 (1998) (quoting from *Post*, 197 Wis. 2d at 319, 541 N.W.2d at 129). This does not mean, however, that there must be total congruence in the treatment of those who are similarly situated: "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Post*, 197 Wis. 2d at 321, 541 N.W.2d at 130 (quoted source omitted). Among the factors that will justify disparate approaches in the context of a case arising under WIS. STAT. ch. 980, are "[d]ifferences in difficulty of diagnosis, degree of dangerousness, and intrusiveness of treatment." *Id.*, 197 Wis. 2d at 322, 541 N.W.2d at 130.

*Id.* Moreover, the *Post* court found "the state's dual interests represented by chapter 980 to be

both legitimate and compelling." *Post*, 197 Wis. 2d at 302-03 citing *Addington*, 441 U.S. at 426, and *United States v. Salerno*, 481 U.S. at 748-49.

The *Williams* court then went on to analyze the equal protection claim and found that the governmental interests at stake in ch. 980 were unique from those in ch. 51 and § 971.17 commitments, justifying the different approaches in those respective procedures. *Id.* ¶¶ 12–20. The court noted that the law for persons acquitted by Not Guilty by Reason of Insanity (NGI) "only *infers* current mental illness and dangerousness when a person is found to have violated the criminal law but to be not responsible for that violation because he or she had a mental disease or defect at the time." *Id.* ¶ 17 (emphasis in original). In contrast to the inferences that an NGI acquittal permits about the person's current mental state and current dangerousness, a person may not be committed under ch. 980 unless the State proves beyond a reasonable doubt both that the person currently suffers from a mental disorder and that the person is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. *See id.* ¶ 18; Wis. Stat. §§ 980.01(7), 980.05(3)(a).

As the *Williams* court cogently explained, "This is a critical distinction between the classes of persons committed under WIS. STAT. § 971.17 and those committed under chapter 980, and reflects the legislature's judgment that sexually violent persons, as a class, are substantially more dangerous than those subject to the procedures in § 971.17." *Williams*, 249 Wis. 2d 1, ¶ 18. Accordingly, "[T]hose who have 'been found not guilty of or not responsible for a sexually violent

offense by reason of insanity or mental disease' are subject to the more stringent levels of control and treatment under ch. 980." *Id.* (quoting Wis. Stat. § 980.01(7)).

This court reached the same conclusion about ch. 51 committees. *Post*, 197 Wis. 2d at 322, ("The legislature has determined that, as a class, persons predisposed to sexual violence are more likely to pose a higher level of danger to the community than do other classes of mentally ill or mentally disabled persons.").

The *Williams* court also concluded

> the significant differences between the degree of danger posed by each of the two classes of persons [(ch. 51 and ch. 980)], as well as the differences in what must be proven in order to commit under the two chapters, justify on a strict-scrutiny analysis the disparate, but narrowly tailored, procedures . . . ."

*Williams*, 249 Wis. 2d 1, ¶ 16. This court reached a similar conclusion in *Post*. "This heightened level of dangerousness and the unique treatment needs of sexually violent persons justify distinct legislative approaches to further the compelling governmental purpose of protection of the public." *Post*, 197 Wis. 2d at 322-23.

In light of the above cases, it is apparent that, while ch. 51 and ch. 971 committed person may be "similarly situated" to ch. 980 committed persons for some purposes, ch. 980 need not contain the identical procedures as those applicable to ch. 51 or ch. 971 commitments. This was true for the substantive and procedural differences at issue in *Post*, *Williams* and *Rachel I.* It is, and should be, just as true for the

assignment of the burden of proof in ch. 980 supervised release hearings. The State's compelling interest in protecting the public provides the necessary justification for the different treatment of ch. 980 respondents and ch. 51 or ch. 971 committees as a class in each of these circumstances.

## CONCLUSION

For the reasons given above, this court should affirm the circuit court's order denying West's petition for supervised release.

Dated at Madison, Wisconsin, this 28th day of February, 2011.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,849 words.

Dated this 28th day of February, 2011.

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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of February, 2011.

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I N S U P R E M E C O U R T

Case No. 2009AP1579

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In re the commitment of Edwin C. West:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

EDWIN C. WEST,

Respondent-Appellant-Petitioner.

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On Appeal from an Order Denying Supervised Release Pursuant to Chapter 980, Entered in the Milwaukee County Circuit Court, The Honorable M. Joseph Donald, Presiding

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# REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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## ARGUMENT

### Wisconsin Statutes § 980.08(4)(cg) Does Not Shift the Burden of Proving Suitability for Supervised Release from the State to the Person Committed Under Chapter 980.

#### A. The language, history, scope and context of Section 980.08(4)(cg) demonstrate that the legislature intended that the burden of proof remain with the state.

##### 1. Section 980.08(4)(cg) is ambiguous.

As the state concedes, *see* Brief of the Petitioner-Respondent at 3-4, Wisconsin Statutes § 980.08(4)(cg) is ambiguous.

##### 2. The scope, history, and context of Section 980.08(4)(cg) support the interpretation that the burden of proof remains on the state.

As the state also does not dispute, *see id*., when a statute is ambiguous, this Court may consider the scope, history, context, subject matter, and object of the statute. *See* ***State v. Jones***, 226 Wis. 2d 565, 574, 594 N.W.2d 738.

Contrary to the position of the state, *see* Brief of the Petitioner-Respondent at 4-6, the history of Section 980.08(4)(cg) fails to support the notion that the legislature intended to change the burden of proof. The legislative history is decidedly sparse here. Neither party located any legislative drafting records or other documents explaining the change in the statute. As the state appears to acknowledge, *see id*., the only history really is that the original statute stated that a petition for supervised release stated that the court should grant the petition "unless *the state prove[d]*" either of

two conditions, *see* Wis. Stats. § 980.08(4)(b) (2004) (repealed 2005 Wis. Act 434 § 116) (emphasis added), while the new statute just says that supervised release should not be granted "unless…the court finds that all of the … [five] criteria are met," Wis. Stats. § 980.08(4)(cg).

There is no question that the legislature intended the statute change. The question, however, is the scope of that change. The most likely explanation for the failure to identify on whom the burden should be placed is that the legislature was focused on the change of the presumption from the grant of supervised release to the denial of supervised release and on the addition of criteria. *See id*. The legislature likely did not think much about the burden of proof problem and took out the language concerning the state as a "side effect," either solely or in part, of reworking the presumption. Surely the legislature, which had a clearly stated burden of proof in front of it, would have supplied burden of proof language placing it on the respondent if the legislature had intended to shift the burden of persuasion.

As for the scope and context of the statute, the argument that reading the statute to place the burden on the state creates a problem due to the state's lack of incentive. *See* Brief of the Petitioner-Respondent at 6-7, is specious. If the burden is on the respondent, absent cooperation from the state, petitions for supervised release always will be denied. As Mr. West has noted before, *see* Brief of Respondent-Appellant-Petitioner at 9, whether "[t]reatment that meets the person's needs and a qualified provider of the treatment are reasonably available," *see* Wis. Stats § 980.08(4)(cg)(3), is a matter which is in the control of the state. This statement is true because availability is a matter of what the state is willing to supply and pay for from its funds. *See id*. § 980.12; *see also* ***State v. Morford***, 2006 WI App 229 ¶5, 297 Wis. 2d 339, 345, 724 N.W.2d 916. Despite the existence of a report that includes information on "[a]ny specialized needs or conditions associated with the person that must be considered

in future treatment planning," and information on "[t]he ongoing treatment needs of the person," *see* Wis. Stats. § 980.07(4) (setting forth the items to consider in a treatment progress report), this information is not information about whether treatment, housing, and other resources which meet those needs are or could be "reasonably available."

Nor should much credence be placed in the supposed problem that placing the burden of proof on the state would require proof of a negative as to three of the criteria. *See* Brief of Petitioner-Respondent at 10. Before the change in the statute, the state was required to prove "[t]hat the person has not demonstrated significant progress in his or her treatment or the person has refused treatment," Wis. Stats. § 980.08(4)(b)(2003-04), just as would be the case now, Wis. Stats. § 980.08(4)(cg)(1), and the state never suggested before that making that proof was unreasonably onerous. In addition, given the information concededly in the hands of the state, such as information on risk factors, treatment needs, and specialized needs, *see* Wis. Stats. § 980.07(1); *see also* Brief of Petitioner-Respondent at 11-12, the state should have no difficulty proving that treatment meeting the person's needs is not reasonably available or that the person cannot reasonably be expected to comply with treatment.

3. The factors courts consider when placing the burden of proof also support the interpretation that the burden of proof in Section 980.08(4)(cg) remains on the state.

Both parties agree that, in considering where to place the burden of proof, this Court should consider ***State v. McFarren***, 62 Wis. 2d 492, 499-500, 215 N.W.2d 459 (1974). *See generally* Brief of Petitioner-Respondent at 9. Where the parties differ is on how these factors apply and the conclusion to which they lead.

In suggesting that the burden should be placed on the person committed because that person desires change, the state fails to account for the liberty interests involved in commitment cases. In fact, the state suggests that there is no liberty interest involved in the level of interference with liberty of a person committed. *See* Brief of the Petitioner-Respondent at 16. The state, however, ignores ***Vitek v. Jones***, 445 U.S. 480, 491-92 (1979), in which the choice of location for curtailment of liberty mattered. Nor does the state acknowledge that, as a policy matter, the high value our society places on liberty, *see, e.g.,* U.S. const. amends xiv; Wis. const. art. I §8, should mandate that the party seeking the more restrictive environment should bear the risk of the failure of proof.

As for the "judicial estimate of probabilities," the state in essence asks this Court to take a position contrary to what research shows about sexually violent persons. The state asks this Court to believe that reduction in risk is an "unusual event" without treatment and that abatement of mental disorders without treatment also is unusual. *See* Brief of the Petitioner-Respondent at 12-13. Neither assertion is true. In fact, the risk of future sexual violence for a large number of people found to be sexually violent declines, with or without treatment, as the person ages. *See, e.g.,* R.K. Hanson, Does Static-99 Predict Recidivism Among Older Sexual Offenders, 18 Sex Abuse 343, 344 (2006). Similarly, mental disorders, such as antisocial personality disorder, are not static and can abate over time. *See, e.g.,* Diagnostic and Statistical Manual of Mental Disorders 623 (4th ed. 1994) ("Some types of Personality Disorder (notably Antisocial…Personality Disorder[s]) tend to become less evident or to remit with age."); W. John Livesley, Handbook of Personality Disorders: Theory, Research and Treatment 118 (2001).

Arguably, the state also asks this Court to presume that treatment does not work. Another way to conclude, as the state does, *see* Brief of the Petitioner-Respondent at 12-13,

that supervised release requires some "unusual event" such as reduction of risk, is to presume that treatment is unlikely to have much effect and is unlikely to reduce the risk of sexual recidivism. This Court has refused to presume that treatment is not "a bona fide goal of this statute" and has refused to credit the view any "'recognition' in the psychiatric-medical community that treatment for sex offenders is 'largely ineffective.'" *See* ***State v. Post***, 197 Wis. 2d 279, 307-08, 541 N.W.2d 115 (1995). To do so would be to presume that the legislature was not acting in good faith in passing Chapter 980 because treatment was never a 'serious objective' of the statute. *See generally* ***id.***

B. The burden of proof remains with the state to avoid having Section 980.08(4)(cg) violate the constitutional right of persons committed under Chapter 980.

1. The burden of proof remains with the state to avoid having section 980.08(4)(cg) violate due process.

This Court should hold that Wisconsin Statutes §980.08(4)(cg) places the burden of proof on the state because placing the burden of proof on Mr. West violates principles of due process. Due process protects a person not only from commitment but also from physical restraint. "Freedom from physical restraint is a fundamental right that 'has always been at the core of the liberty protected by the Due Process Clause…'" ***Post***, 197 Wis. 2d at 302, (quoting ***Foucha v. Louisiana***, 504 U.S. 71, 80, (1992)). Moreover, due process protects a person not only from commitment itself but also from a commitment whose nature fails to bear some reasonable relationship to the purpose of the commitment. ***Jackson v. Indiana,*** 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.); *accord,* ***Seling v. Young***, 531 U.S. 200, 265 (2001).

The state can cite no case that has ever stated that a committed person has no due process liberty interest in whether he is confined or whether he is in the community on some type of supervision. The state can cite no case that has ever stated that a committed person has no due process liberty interest in whether he is confined or whether he is in the community on some type of supervision. ***Jones v. United States***, 46 U.S. 354 (1983) involved an insanity-defense committee who was seeking release from his commitment and not arguing for some form of supervised release. Similarly, in ***Kansas v. Hendricks***, 521 U.S. 346 (1997), the issue was whether the commitment of a sexually violent person as a general matter violated due process and the Court simply did not consider any issue concerning the availability or lack of availability of any type of supervised release. In ***Foucha***, 504 U.S. 71, although Foucha originally sought a conditional release, the issue turned into one of whether the state could continue his commitment at all, given that he was not mentally ill.

Nor have Wisconsin courts ever stated that Chapter 980 would remain constitutional in the absence of a provision for supervised release or that there is absolutely no liberty interest in supervised release. In ***In re Commitment of Rachel***, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762, the Court dealt with limitations on supervised release and not its removal as a possibility. Although the Court could simply have stated that no liberty interest exists in supervised release, the Court restricted itself to saying that some limitation on supervised release did not make the statute unconstitutional.

Moreover, the state's suggestion that commitment should distinguish a liberty interest in the type of confinement just as a valid criminal conviction and sentence can is unpersuasive. *See* Brief of the Petitioner-Respondent at 19. Unlike a criminal act that forms the basis for confinement in criminal cases, neither the mental disease or defect nor the act that forms the basis for commitment under Chapter 980 is, by

definition, under voluntary control. *See* ***In re the Commitment of Laxton***, 2002 WI 82, ¶21, 254 Wis. 2d 185, 202, 647 N.W.2d 784 (commitment under Chapter 980 implicitly requires proof of lack of control). Thus, a criminal defendant, unlike a person committed under Chapter 980, can be said to have forfeited or waived the underlying liberty interest through his or her actions.

2. The burden of proof remains with the state to avoid having section 980.08(4)(cg) violate the equal protection clause.

Mr. West's position on this issue is fully set forth in his brief-in-chief and will not be repeated here.

## CONCLUSION

This Court therefore should vacate the order denying supervised release and should remand the matter to the trial court with directions to hold a new hearing at which the burden of proof is placed on the state.

Dated this __ day of March, 2011.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this reply brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,013 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ___ day of March, 2011.

Signed:

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