THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

661 REEXAMINATION UNDER § 971.17(2)[2]

In this proceeding, (name of petitioner) has petitioned this court for reexamination of his mental condition[3] as he has a right to do under the law.

The issue raised by his petition is whether he may be safely discharged or released without danger to himself or others.[4]

The burden is on the State[5] to prove that (name of petitioner) cannot be safely discharged or released without danger to himself or others.

(Name of petitioner) need not prove that he can be safely discharged or released without danger to himself or others, and you are not to assume merely from the fact that he is confined at (name of institution) that he is presently a danger to himself or others. The State must convince you to a reasonable certainty by evidence which is clear, satisfactory, and convincing[6] that (name of petitioner) cannot be safely discharged or released without danger to himself or others.

The following three forms of verdict[7] will be submitted to you for your consideration:

One reading: "We, the jury, find (name of petitioner) should be recommitted to the custody of the department at an appropriate institution."

If you decide on this verdict, (name of petitioner) will be returned to an appropriate institution under his present status.

Another verdict reading: "We, the jury, find (name of petitioner) may be safely released upon such conditions as the court deems necessary."[8]

If you decide on this verdict, (name of petitioner) will remain in the legal custody of the department but will be released from the (name of institution) under such conditions deemed appropriate by this court.

Another verdict reading: "We, the jury, find (name of petitioner) may be safely discharged from the custody of the department."

If you decide on this verdict, (name of petitioner) will be released without restriction and will have his complete freedom as far as this case is concerned.

It is for you to determine which one of the forms of verdicts submitted you will bring in as your verdict.

The law provides that, in this case, the verdict is valid only if at least five (5)[9] members of the jury have agreed to it.

COMMENT

Wis JI-Criminal 661 was originally published in 1980 and revised in 1984, 1988, 1990, and 1992. It was republished without substantive change in 2011.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination is replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. This instruction is recommended for use when a person committed as not guilty by reason of mental disease or defect receives a hearing on his petition of reexamination under § 971.17(2). The petitioner has the right to a jury at such a hearing, State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 259 N.W.2d 531 (1977); at the hearing, the state has the burden of going forward with the evidence and the burden of proof. The only issue at the hearing is the defendant's dangerousness, see note 4 below.

Section 971.17(2) was amended by supreme court order to allow the receipt of testimony over the telephone at the reexamination hearing: "Upon consent of all parties and approval by the court for good cause shown, testimony may be received by telephone or live audiovisual means." Order of the Wisconsin Supreme Court dated October 29, 1987. 141 Wis.2d xxi-xli. Also see Fullin and Williams, "Teleconferencing Comes To Wisconsin Courts," Wisconsin Bar Bulletin, January 1988.

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

The instruction assumes that the petition is filed by one who is confined in an institution and is seeking discharge or release on conditions. However, a person already released on conditions may also file a petition to seek outright release. In such a case, this instruction would have to be modified to accurately reflect the petitioner's status.

If the department wishes to transfer a person committed under § 971.17 to the care of a community board established under § 51.42 or § 51.437, the approval of the committing court must be obtained. See § 51.37(4).

3. Section 971.17(2) refers to this proceeding as a "reexamination of a defendant's mental condition." (Emphasis added.) Therefore, this phrase has been retained in the instruction even though the sole issue at the reexamination is dangerousness, and present mental illness need not be established. See State v. Gebarski, 90 Wis.2d 754, 280 N.W.2d 672 (1979).

4. In the second Gebarski decision, cited above, note 3, the Wisconsin Supreme Court held that dangerousness was the only issue on reexamination; the establishment of mental illness is required neither by statute (90 Wis.2d 754 at 761-68) nor by principles of equal protection and due process (90 Wis.2d 754 at 769-73).

Gebarski was decided at a time when Wisconsin law required that a finding of present mental illness and dangerousness be made before a defendant could be committed after being found not responsible by reason of mental disease or defect. This third phase of the "trifurcated" trial was abolished by the Wisconsin Supreme Court in State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Because the procedures for commitment have changed, it is possible that the continued validity of the Gebarski standards for reexamination is open to question.

The Field decision upheld the automatic commitment of one found not guilty by reason of mental disease. In doing so, it relied heavily on a decision of the U.S. Supreme Court, Jones v. United States, 463 U.S. 354 (1983). Jones upheld the automatic commitment procedure of the District of Columbia, justifying the result at least in part by pointing to the standard applied to the review of the commitment: The defendant is to be released if he establishes either that he is no longer mentally ill or that he is no longer dangerous to himself or others. This standard differs from the one established by Gebarski because the latter standard looks only to

dangerousness. The Field opinion itself seems to emphasize this difference when, in quoting the Jones release standard, it added emphasis to the disjunctive nature of that standard by underlining the word "or":

> In addition, in Jones the court recognized that a committed acquittee ". . . is entitled to release when he has recovered his sanity or is no longer dangerous." 103 S. Ct. at 3051. (Emphasis added.) 118 Wis. 2d 269, 279-80.

Despite appearing to point out this disparity between the Jones and the Gebarski release standards, the Field opinion went on to review the Wisconsin reexamination procedures with apparent approval, suggesting that they were like those approved in Jones in affording the committed person a chance for prompt review of his commitment and possible release. 118 Wis.2d 269, 280.

Thus, Field is ambiguous about the continued viability of the Gebarski release standard. Despite the indirect references discussed above, the opinion did explicitly state that it was not addressing the reexamination question:

> . . . any issues concerning the constitutionality of the reexamination and release procedures under sec. 971.17(2) . . . are not raised in this case and we do not decide them.

118 Wis.2d 265, 281.

The Gebarski standard is more directly challenged by the decision in Foucha v. Louisiana, United States Supreme Court, May 18, 1992. Foucha held that Louisiana statutes similar, but not identical, to Wisconsin's, were unconstitutional because they allowed continued commitment of dangerous offenders who were no longer mentally ill. The Foucha decision is discussed in more detail in Wis JI-Criminal 600, Introductory Comment, at Section V.,C. Trial courts should carefully review the Foucha decision before using Wis JI-Criminal 661.

5. The allocation of the burden is clear: ". . . the burden of showing dangerousness is on the state." State v. Gebarski, 90 Wis.2d 754, 770, 280 N.W.2d 672 (1979).

6. This burden of proof was approved in State v. Gladney, 120 Wis.2d 486, 355 N.W.2d 547 (Ct. App. 1984).

7. The three verdict questions are those recommended by the Wisconsin Supreme Court in the first Gebarski decision, 80 Wis.2d 489, 502. The use of the questions was implicitly approved in the second Gebarski decision, 90 Wis.2d 754, 760. See Wis JI-Criminal 662 for a sample verdict form.

8. If the jury determines that release on conditions is appropriate, it is the duty of the judge to establish those conditions. The Committee recommends that the judge contact the department to assure that the conditions imposed can be fulfilled.

9. The suggested instruction assumes that the reexamination jury will be composed of six members and that agreement by five-sixths is sufficient (see § 51.20(11)(a) and (b)).

