

2505 PRELIMINARY INSTRUCTION: HEARING ON DISCHARGE OF A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

Wisconsin law provides that a person may be committed to the custody of the Department of Health and Family Services if the person is found to be a sexually violent person. (Name of petitioner) was committed under this law.

A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.

Wisconsin law provides that a person committed may petition for discharge. (Name of petitioner) has filed a petition for discharge and Wisconsin law also provides that a jury determine whether the petition for discharge should be granted. The burden of proof is on the State to satisfy you to a reasonable certainty by evidence that is clear and convincing that (name of petitioner) is still a sexually violent person.

At the conclusion of the hearing you will be asked to decide whether (name of petitioner) is still a sexually violent person.

COMMENT

Wis JI-Criminal 2505 was originally published in 1996 and revised in 1999, 2005 and 2012. This revision was approved by the Committee in February 2014; it updated the Comment.

This instruction is intended to be used as a preliminary instruction at the beginning of a hearing on a petition for discharge of a person committed as a "sexually violent person" under Chapter 980. See §§ 980.09 and 980.095. Section 980.09, as originally enacted, provided that the discharge hearing "shall be to the court." The Wisconsin Supreme Court held in State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995), that equal protection requires that the person be afforded the right to a jury at the discharge hearing. The Post decision compared Chapter 980 proceedings with those applicable to civil mental commitments under Chapter 51, and held that a 6-person jury and the "clear and convincing" burden of

proof applied. Based on the comparison with Chapter 51, the Committee concluded that a five-sixths verdict should apply. See § 51.20(11)(b), providing for a five-sixths verdict for civil commitment reexaminations.

2005 Wisconsin Act 434 [effective date: August 1, 2006] repealed and recreated § 980.09 and created § 980.095. Both sections were also amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013]. Section 980.09(3) provides for a trial before the court or a jury at which "the state has the burden to prove by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Section 980.095 provides as follows with regard to the trial:

- the district attorney or the department of justice, whichever filed the original petition, or the person who filed the petition for discharge may request that the trial be held before a jury of 6. [§ 980.095(1)(a)].
- a jury is deemed waived unless it is demanded within 10 days of the determination by the court that a court or jury would likely conclude under s. 980.09(1) that the person's condition has sufficiently changed. [§ 980.095(1)(a)].
- jury selection procedures are set forth in § 980.095(1)(b).
- the verdict must be agreed to by at least 5 jurors. [§ 980.095(1)(c)]

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

Wis JI-Criminal 2506 is the instruction to be given at the end of the hearing.