2506 DISCHARGE OF A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

You will now be asked to decide whether (name) is still a sexually violent person.[1]

State's Burden of Proof

Before you may find that (name) is still a sexually violent person, the state must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear and convincing that the following three facts are established.[2]

The Facts That Must Be Established

1. That (name) has been convicted of[3] a sexually violent offense.

   ELECT ONE OF THE FOLLOWING DEPENDING ON THE BASIS FOR THE COMMITMENT.

   [(Name crime specified in § 980.01(6)(a)) is a sexually violent offense.][4]

   [(Name crime specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[5] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification.][6]

2. That (name) currently has a mental disorder.

   "Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence[7] and causes serious difficulty in controlling behavior.[8]

   The term "mental disorder" is also used in a more general way by the mental health profession to diagnose and describe mental health-related symptoms and disabilities. Only those mental disorders that predispose a person to engage in acts

of sexual violence and cause serious difficulty in controlling behavior are sufficient for purposes of commitment as a sexually violent person.[9]

You are not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder.[10]

3. That (name) is dangerous[11] to others because (he) (she) has a mental disorder which makes it more likely than not[12] that (he) (she) will engage in one or more[13] future acts of sexual violence.

Meaning of "Acts of Sexual Violence"

"Acts of sexual violence" means acts which would constitute "sexually violent offenses."[14]

ELECT ONE OF THE FOLLOWING DEPENDING ON THE BASIS FOR THE COMMITMENT.[15]

[(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.][16]

[(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[17] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification.][18]

ADD THE FOLLOWING IF EVIDENCE OF OTHER SEXUALLY VIOLENT OFFENSES HAS BEEN ADMITTED.

Evidence of Other Offenses

[Evidence has been submitted that (name) committed other sexually violent offenses before committing (identify offense on which the commitment is based). This evidence

alone is not sufficient to establish that (name) has a mental disorder.[19] Before you may find that (name) has a mental disorder, you must be so satisfied to a reasonable certainty by evidence that is clear and convincing.]

Jury's Decision

The following verdict will be submitted to you for your consideration:

"Is (name) still a sexually violent person?"

Before you may answer this question "yes," the State must satisfy you to a reasonable certainty by evidence that is clear and convincing that (name) has been convicted of a sexually violent offense, that (he) (she) has a mental disorder, and that (he) (she) is dangerous to others because the mental disorder makes it more likely than not that (he) (she) will engage in one or more future acts of sexual violence.

If you are not so satisfied, you must answer the question "no."

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The burden is on the State to satisfy you to a reasonable certainty by evidence that is clear and convincing that (name) is still a sexually violent person.

"Clear and convincing evidence" means evidence which, when weighed against that opposed to it, clearly has more convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.[20]

The law provides that any verdict returned by the jury shall be agreed to by at least five of the jurors. I ask you to try to be unanimous if you can.[21]

Closing

When you retire to the jury room select one of your members to preside over your deliberations. His or her vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside. At the foot of the verdict, you will find a place provided where a dissenting juror, if there is one, will sign his or her name. Either the blank line or the space below it may be used for that purpose.

Swear the officer.

COMMENT

Wis JI-Criminal 2506 was originally published in 1996 and was revised in 1997, 1999, 2005, 2012, 2015, 2017, and 2021. The 2012 revision changed the definition of "mental disorder" – see footnote 9 – and revised and updated the Comment. The 2015 revision added a definition of the burden of persuasion and updated the Comment. This revision was approved by the Committee in February 2021; it added to the Comment.

This instruction is for the finding at 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 consuming" 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 2505 provides a preliminary instruction to be given at the beginning of the hearing.

There is no case law or statutory requirement that the jury at a Chapter 980 discharge hearing be advised of the consequence of a decision to discharge; whether to grant a person's request for an instruction telling the jury that he would be under supervision is within the trial court's discretion. State v. Lombard, 2004 WI App 52, 271 Wis.2d 529, 678 N.W.2d 338.

In State v. Richard, 2011 WI App 66, 333 Wis.2d 708, 799 N.W.2d 509, the court specified the procedure to be followed when a petition for discharge is filed:

> ¶11. . . . The circuit court must then engage in a two-step review process to determine if the offender is entitled to a discharge hearing. First, the court must conduct a "paper review" of the offender's petition and its attachments to see if there are any alleged facts "from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person." State v. Arends, 2010 WI 46, ¶¶25 26, 325 Wis.2d 1, 784 N.W.2d 513 (quoting § 980.09(1)). The purpose of the paper review "is to weed out meritless and unsupported petitions." Arends, 325 Wis.2d 1, ¶28. If there are no facts alleged from which a trier of fact could conclude that the offender is no longer a sexually violent person, the circuit court must deny the petition. Id., ¶30.
>
> ¶12 If the offender passes the initial screen, the circuit court shall proceed to the second step of the review process. Id.; Wis. Stat. § 980.09(2). Under the second step of this process, the court must consider: (1) any current and past reexamination reports or treatment progress reports filed under Wis. Stat. § 980.07; (2) relevant facts in the petition and in the State's written response; (3) arguments of counsel; and (4) any supporting documentation provided by the person or the State.

> Arends, 325 Wis.2d 1, ¶32. If, after this second step in the review process, the circuit court determines that a fact finder could conclude that an offender no longer meets the criteria for commitment as a sexually violent person, the offender is entitled to a discharge hearing. Id., ¶43. If not, the offender's discharge petition must be denied.

The requirement in § 980.09(1) that a petition for a discharge from a Chapter 980 commitment allege facts from which the court or jury may conclude the person's condition has changed "includes not only a change in the person himself or herself, but also a change in the professional knowledge and research used to evaluate a person'\'s mental disorder or dangerousness, if the change is such that a fact-finder could conclude the person does not meet the criteria for a sexually violent person." State v. Ermers, 2011 WI App 113, ¶1, 336 Wis.2d 451, 802 N.W.2d 540.

Section 980.09(1) was amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013] to slightly change the wording that was quoted in the Richard and Ermers cases. The amended statute provides that:

> . . . The court shall deny the petition . . . without a hearing unless the petition alleges facts from which the court or jury would likely conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment if the person has never received a hearing on the merits of a discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

In State v. Richard, 2014 WI App 28, 353 Wis.2d 219, 844 N.W.2d 370, the issue was whether a person committed under Chapter 980 was entitled to a discharge hearing when the petition was "based on amendments to an actuarial instrument used at trial that, in an evaluating expert's opinion, reduced the petitioner's risk to reoffend below the legal threshold of 'more likely than not.'" The court of appeals concluded "that when a petitioner alleges that he or she is no longer a sexually violent person, and supports his or her petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence, the petitioner is entitled to a discharge hearing . . ." Richard, ¶1.

Summary judgment is not available to the respondent in a Chapter 980 proceeding. State v. Allison, 2010 WI App 103, 329 Wis.2d 129, 789 N.W.2d 120. In Allison, the experts who examined the committed person in connection with discharge proceedings concluded he was no longer dangerous. This led him to file a motion for summary judgment on the ground the state could not prove he was still a sexually violent person. Id., ¶¶6-9. The court of appeals held that, under the language of § 980.09, a court handling a discharge petition has two options: deny the petition without a hearing or hold a hearing. Thus, summary judgment was not available. Id., ¶¶13-25.

In State v. Stephenson, 2020 WI 92, 394 Wis. 2d 703, 951 N.W.2d 819, the Wisconsin Supreme Court addressed an issue not directly raised in Allison: whether the state is required to present expert testimony to prove that a person is dangerous because their mental disorder makes it more likely than not that they will reoffend in a sexually violent manner. The Court held that this element – regarding the likelihood the respondent will engage in future acts of sexual violence – is well within the province of the lay factfinder. Therefore, though expert testimony on the third element may inform the factfinder's decision, such testimony is not necessary to prove the element.

In State v. Alger, 2015 WI 3, 360 Wis.2d 193, 858 N.W.2d 346, the court addressed the applicability

of the Daubert standard for expert testimony to a discharge proceeding in a Chapter 980 case. The Daubert standard, as adopted in § 907.02(1), applies to "actions" or "special proceedings" commenced on or after February 1, 2011. In Alger (and in Knipfer, a companion case consolidated for appeal) the commitment proceedings took place before that effective date but the discharge proceedings began after the date. The court concluded that ". . . although Alger's and Knipfer's petitions seek relief from those original commitments, those filings do not constitute the 'commencement' of an 'action' or a 'special proceeding.'" ¶4. Therefore, the standard in § 907.02(1) does not apply.

1. Section 980.09(3) provides that at the hearing, the "state has the burden of proving by clear and convincing evidence that the petitioner meets the criteria for commitment as a sexually violent person."

2. In State v. Post, 197 Wis.2d 279, 328 29, 541 N.W.2d 115 (1995), the Wisconsin Supreme Court held that "equal protection demands that a right to a jury trial be made available at this important stage," referring to the discharge hearing. A jury of six is sufficient [§ 980.095(1)] and "the state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." See § 980.09(3). The required aspects of a "sexually violent person" finding are set forth in § 980.02(2):

(a) the person has been convicted of a sexually violent offense [or found delinquent for, or found not guilty by reason of mental disease or defect of such an offense];

(b) has a mental disorder;

(c) is dangerous to others because the person's mental disorder makes it more likely than not that he or she will engage in acts of sexual violence.

These three facts are defined in the instruction in the same manner as in the instruction for the original commitment. See Wis JI-Criminal 2502.

The clear and convincing evidence standard satisfies due process at a discharge proceeding. State v. Talley, 2015 WI App 4, 359 Wis.2d 521, 859 N.W.2d 155.

3. The instruction is drafted for a case alleging that the person has been "convicted of" a sexually violent offense. But persons may also be committed under Chapter 980 if they have been "found delinquent for a sexually violent offense" or "found not guilty of a sexually violent offense by reason of mental disease or defect." § 980.02(2)(a)2. and 3. If either of these other options is present, the appropriate term must be substituted for "convicted of" throughout the instruction.

4. Section 980.01(6)(a) provides that the following crimes are "sexually violent offenses":

- § 940.225(1) First Degree Sexual Assault
- § 940.225(2) Second Degree Sexual Assault
- § 948.225(3) Third Degree Sexual Assault
- § 948.02(1) First Degree Sexual Assault Of A Child
- § 948.02(2) Second Degree Sexual Assault Of A Child
- § 948.025 Repeated Acts Of Sexual Assault Of A Child
- § 948.06 Incest With A Child
- § 948.07 Child Enticement

- § 948.085 Sexual Assault Of A Child Placed In Substitute Care

In State v. Irish, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997), the court held that a conviction for child enticement under former § 944.12 can be the predicate for a sexual predator commitment. See note 4, Wis JI-Criminal 2502.

5. Section 980.01(6)(b), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses" if they were sexually motivated:

- § 940.01 First Degree Intentional Homicide
- § 940.02 First Degree Reckless Homicide
- § 940.03 Felony murder
- § 940.05 Second Degree Intentional Homicide
- § 940.06 Second Degree Reckless Homicide
- § 940.19(2) Battery [Substantial Battery With Intent To Cause Bodily Harm]
- § 940.19(4) Battery [Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.19(5) Battery [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.19(6) Battery [Substantial Risk Of Great Bodily Harm]
- § 940.195(4) Battery To An Unborn Child (Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.195(5) Battery To An Unborn Child [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.30 False Imprisonment
- § 940.305 Taking Hostages
- § 940.31 Kidnapping
- § 941.32 Administering A Dangerous Or Stupefying Drug
- § 943.10 Burglary
- § 943.32 Robbery
- § 948.03 Physical Abuse Of A Child

2005 Wisconsin Act 434 also created subsection (6)(bm) to read:

> (6)(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

Subsection 980.05(3)(b) provides that if the petition alleges one of these crimes, "the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated."

6. This is the definition provided in § 980.01(5).

7. This is the definition provided in § 980.01(2). The Wisconsin Supreme Court found the definition "satisfies the mental condition component required by substantive due process for involuntary mental commitment." State v. Post, 197 Wis.2d 279, 303, 541 N.W.2d 115 (1995).

The Wisconsin definition of "mental disorder" is almost identical to the definition used in the state of Washington's Community Protection Act of 1990, which allows the commitment of "sexually violent

predators." The Washington law uses the term "mental abnormality" where Wisconsin uses "mental disorder," but defines it as follows: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." RCW 71.09.020(2). The Washington Supreme Court upheld the constitutionality of the predator provisions in In re Young, 857 P.2d 989 (Wash. 1993). A federal court in Washington found the definition to be inadequate because it created "an unacceptable tautology." Young v. Weston, 898 F. Supp. 744, 750 (D.C. Wash. 1995).

The Kansas Supreme Court has held that a similar definition of "mental abnormality" found in the Kansas Sexually Violent Predator Act failed to satisfy constitutional standards. In re Hendricks, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed the state court decision. See Kansas v. Hendricks, 521 U.S. 346 (1997).

8. The phrase "and causes serious difficulty in controlling behavior" was added in February 2002 in response to the decision of the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). Crane vacated a decision of the Kansas Supreme Court that held the Kansas "sexually violent predator" statute was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Kansas court concluded that Kansas v. Hendricks, 521 U.S. 346 (1997), required that finding. Crane held that Hendricks did not set forth a requirement of total or complete lack of control. "It is enough to say that there must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413. The provisions of Wisconsin's Chapter 980 are similar to, though not identical with, the Kansas statutes reviewed in Crane. The Committee concluded that adding reference to "serious difficulty in controlling behavior" to the definition of "mental disorder" was an appropriate response to Crane.

On July 1, 2002, the Wisconsin Supreme Court decided State v. Laxton, 2002 WI 82, 254 Wis.2d 185, 646 N.W.2d 784. The court reaffirmed that Wisconsin's Chapter 980 is constitutional, held that a separate finding on difficulty in controlling behavior is not required, and held that a jury instruction without reference to "difficulty . . ." was not error: "In summary, we have concluded that civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior. The requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness." 2002 WI 82, ¶30.

The Laxton court acknowledged the February 2002 revision of Wis JI-Criminal 2502 in a footnote:

> 14. We recognize that after Crane, Wisconsin Jury Instruction Criminal 2502 was revised to add language linking the mental disorder to the person's difficulty in controlling behavior. The revised jury instruction reads, in part:
>
> > "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. . . . Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. Wis JI-Criminal 2502 (Special Release 2/2002) (footnotes omitted).
>
> The revised language was not used in Laxton's trial. Thus, we do not discuss the impact of the revised language, nor do we comment with either approval or disapproval of the revised language.

2002 WI 82, ¶24, footnote 14.

The Committee originally interpreted Crane as requiring that the "serious difficulty in controlling behavior" issue be communicated to the jury. Laxton clearly states that it need not be, because it is implicit in the other standards for a Chapter 980 commitment. Despite the decision in Laxton, the Committee decided to keep the Crane addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to make explicit what is implicit in the statutory standard.

The evidence was found to be sufficient in a post Laxton case in State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. Also see State v. Tainter, 2002 WI App 296, 259 Wis.2d 389, 655 N.W.2d 538.

9. The 2011 revision changed the definition of "mental disorder" to make it more understandable to the jury and to address an inconsistency in the previously published version. In an unpublished decision, the Wisconsin Court of Appeals noted that the 2007 version of the instruction was "internally inconsistent" in its definition of "mental disorder," but concluded that the instruction as a whole properly conveyed the required elements. State v. Williams, No. 2010AP781, decided Nov. 18, 2010.

The source of the difficulty is that "mental disorder" is used as a term of art in Chapter 980 and has a specific definition – see § 980.01(2) – that is essential to the constitutionality of the sexually violent persons law. See State v. Post, 197 Wis.2d 279, 306, 541 N.W.2d 115 (1995). However, "mental disorder" is also the term used in a broader sense by mental health professionals to describe and categorize mental health-related symptoms. [See Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, American Psychiatric Association (2013).] And, the term is one that lay persons, including jurors, may also use in a non-technical sense. The revised instruction acknowledges that the term "mental disorder" may have these other meanings in other contexts but emphasizes that "as used here" for purposes of Chapter 980 commitment, it must be given its specific Chapter 980 meaning.

In State v. Adams, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), the court found the evidence sufficient to establish "mental disorder" and held that an antisocial personality disorder can qualify as a "mental disorder" if it predisposes the specific defendant to sexual violence. In State v. Zanelli, 223 Wis.2d 545, 589 N.W.2d 687 (Ct. App. 1998), the court found that the evidence was sufficient to show "mental disorder" based on pedophilia and held that proof is not limited to literal compliance with the DSM IV criteria for pedophilia – the ultimate issue is whether a "mental disorder" is established.

"[T]he jury must unanimously agree that [the person] suffers from a 'mental disorder' that predisposes him to commit acts of sexual violence . . . [U]nanimity requirements are satisfied, even if jurors disagree as to which mental disease predisposes the defendant to recidivism." State v. Pletz, 2000 WI App 221, ¶19, 239 Wis.2d 49, 619 N.W.2d 97.

10. This statement is based on the one included in Wis JI-Criminal 605, Instruction on the Issue of the Defendant's Criminal Responsibility (Mental Disease). A slightly different version of this statement was cited in Post as an "apt analogy illustrating the need for separation between legal and medical definitions" when "descriptions designed for clinical use are transplanted into the forensic setting." State v. Post, supra, 197 Wis.2d 279, 305.

11. In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court made several general comments about proof of the "dangerousness" requirement: due process does not require proof of a recent overt act while on parole [¶29]; ". . . chapter 980 is reserved for only the most dangerous offenders" [¶32];

"predicting an offender's dangerousness under chapter 980 is a complex evaluation" [¶33]; an offender's behavior while incarcerated can be relevant to a determination of current dangerousness [¶37]; and, ". . . the sexually violent offense for which Bush is incarcerated may be relevant evidence of current dangerousness." [¶38].

In State v. Sorenson, 2002 WI 78, 254 Wis.2d 54, 646 N.W.2d 354, the defendant contended it was error for the trial court to preclude him from introducing evidence relating to a prior conviction for a sexual offense in his Chapter 980 commitment trial. He sought to present evidence that the victim had recanted as part of a challenge to the claim that he suffered from a mental disorder and was dangerous. The Wisconsin Supreme Court remanded the case for a determination whether the recantation evidence "meets the test for newly discovered evidence sufficient to warrant a new trial." 2002 WI 78, ¶2. If it does, "any application of issue preclusion to exclude this evidence from Sorenson's ch. 980 trial would be fundamentally unfair. . ." 2002 WI 78, ¶25. [Note: Sorenson did not challenge the validity of the prior conviction. He sought to challenge its probative value as to the "mental disorder" and "dangerous to others" requirements.]

In State v. Olson, 2006 WI App 32, 290 Wis.2d 202, 712 N.W.2d 61, the court of appeals rejected a claim that the Chapter 980 definition "is unconstitutional because its definition of 'dangerousness' lacks a 'temporal context' limited to 'imminent danger.' . . . It is the propensity for sexual violence, not the precise point at which it may manifest itself, that makes the individual particularly threatening to society." ¶1.

Evidence of possible conditions of supervision is properly excluded from a commitment proceeding because it is not relevant to determining whether the person is a sexually violent person. State v. Mark, 2006 WI 78, ¶41, 292 Wis.2d 1, 718 N.W.2d 90.

12. 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.

In State v. Smalley, 2007 WI App 219, 305 Wis.2d 709, 741 N.W.2d 286, the court of appeals concluded that it was error for an expert to testify at a Chapter 980 commitment hearing that his understanding of "more likely than not" meant "more than zero." However, the court determined that this "isolated misstep did not prevent the real controversy from being tried." ¶2. The court elaborated on the meaning of "more likely than not":

> ¶12. "More likely than not" is not an obscure or specialized term of art, but a commonly-used expression. It is hard to think of a clearer definition of the term than the term itself; though perhaps its expansion to "more likely to happen than not to happen" is more explicit. We find it difficult to imagine that any juror was without an understanding of the phrase's meaning before, during or after the trial, or that any juror thought the phrase meant something other than "more likely to happen than not to happen."

13. The 2007 revision added the reference to "one or more" acts. 2005 Wisconsin Act 434 amended the definition of "sexually dangerous person" in sub. (7) of § 980.01 as follows: ". . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." While the instruction does not directly use this definition, element 3. expresses the same concept, using the statement in § 980.02(2)(c): "The person is dangerous to others

because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence." Act 434 did not amend sub. (2)(c) to add the reference to "one or more." However, Act 434 amended § 980.05(3)(a) to read:

> (3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

The Committee concluded that this was a sufficient basis for adding the reference to "one or more" to the definition in the instruction.

14. This is the Committee's conclusion; it is not directly stated in the statutes. However, another provision of Chapter 980, which requires notice to victims, provides as follows: "'Act of sexual violence' means an act or attempted act that is a basis for an allegation made in a petition under s. 980.02(2)(a)." See § 980.11(1)(a). The acts alleged in the petition are those that qualify as "sexually violent offenses."

This interpretation results in having "sexually violent offense" as a part of each of three parts of the jury's determination. First, the person must have had a prior conviction for a "sexually violent offense." Second, the person's mental disorder must predispose the person to engage in acts of sexual violence, defined as "sexually violent offenses." Third, the person must be dangerous because he has mental disorder which creates a substantial probability that he will engage in acts of sexual violence, again defined as "sexually violent offenses."

15. The Committee assumes that most cases will involve reference to the same "acts of sexual violence" for the purposes of both the second and third factual determinations. See note 12, supra. If they differ, or if it is believed necessary to describe the offenses specifically, the instruction should be tailored to refer to the different offenses that apply in each situation.

16. See note 4, supra, for the offenses specified in § 980.01(6)(a). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

17. See note 5, supra, for the offenses specified in § 980.01(6)(b). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

18. This is the definition provided in § 980.01(5).

19. This sentence is based on § 980.05(4) which provides for the purposes of the original commitment, that "[e]vidence that the person . . . was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder."

20. The paragraphs defining the burden of persuasion were added to the instruction in 2014. They are adapted from Wis JI-Criminal 140A Burden Of Proof: Forfeiture Actions.

21. Section 980.095(3) provides for a five sixths verdict.