STATE OF WISCONSIN CIRCUIT COURT DODGE COUNTY

IN RE: THE COMMITMENT OF

GREGORY SABOURIN,
Respondent.

CASE NO. 04-CI-01

MOTION TO DETERMINE WISCONSIN ACT 187 DOES NOT APPLY

The Respondent, by his attorneys, Greg E. Vollan and Joseph Moore, appearing specially and reserving his right to challenge the jurisdiction of the Court on all proceedings had and taken herein moves the Court for an Order that determines the provisions of Wisconsin Act 187 are not applicable to the proceedings in this case. This motion is brought pursuant to sec. 971.31(2), 971.31(5), 980.03(2) and 980.05(1m) Stats. on the grounds set forth in the attached brief.

Dated September 20, 2004 at Juneau, Wisconsin.

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STATE OF WISCONSIN CIRCUIT COURT DODGE COUNTY

IN RE THE COMMITMENT OF :

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GREGORY SABOURIN,
Respondent.

RESPONDENT'S BRIEF ON EFFECT OF ACT 187

The issue has arisen what the applicable standard of law is in the above referenced matter. The State has opined that 2003 Wisconsin Act 187 applies to the above referenced action. The following is a brief addressing the applicability of Act 187 to this case.

BACKGROUND

Respondent is a person detained under Wisconsin Stats. Chapter 980 and is presently confined to institutional care at the Wisconsin Resource Center. A petition alleging Respondent is a sexually violent person was filed on April 12, 2004. An initial appearance was held on April 15, 2004. A probable cause hearing pursuant to Wis. Stats. 980.04(2) was conducted on August 27, 2004.

At the commencement of the probable cause hearing the Court noted recent legislative changes to Chapter 980 proceedings. One change reduced the standard of commitment from a finding that the prisoner be "much more likely than not" to engage in acts of sexual violence to one that only required a finding of "more likely than not". Rather than decide the issue at the probable cause hearing the Court announced its intention to make separate findings that applied both the old and new standards. It is assumed that at trial the State will continue to assert that the lower standard embodied in Wisconsin Act 187 is applicable to these proceedings.

While this matter was pending the Wisconsin Legislature passed SB 441, which was signed by the Governor on April 7, 2004 and became effective on April 22, 2004. The text of SB 441 is attached. The bill modified the definition of "sexually violent person" under 980.01(7) and modified the pleading requirements of 980.02(2)(c), the supervised release provisions of 980.08(3), the discharge provisions of 980.09(1)(c) and 980.09(2)(c) and created 980.01(1m) (defining "likely") and 980.08(4)(b)(2) (adding a requirement of "significant" treatment progress in supervised release hearings).

SECTION 8 OF ACT 187: "HEARINGS, TRIALS, AND PROCEEDINGS"

The applicability of Act 187 is in Section 8 of the legislation and provides the following:

> The treatment of section 980.01(lm) and (7) of the statutes, the renumbering and amendment of section 980.08(4) of the statutes, and the creation of section 980.08(4)(b) 2, of the statutes first apply to hearings, trials, and proceedings that are commenced on the effective date of this subsection.

The instant matter is before the court on an original petition for commitment. At first blush it appears that Act 187 applies to the case at bar. First impressions can be deceiving. Section 8 of Act 187 applies to "hearings" "trials" and "proceedings". None of these terms are defined in Chapter 980. However, a review of the chapter reveals how the chapter employs the terms at issue. A hearing applies to discharge under 980.09(1)(b), and probable cause under 980.04(2). Trial applies to a 980.02 petition as indicated in 980.03(4) and 980.05. The "trial" provisions of 980.05 apply to the original petitions. A request for supervised release under 980.08 would be in a "proceeding" under 980.08(4). Thus, it appears that the Act applies to proceedings under 980.08, hearings under 980.04 and 980.09 and trials under 980.05.

SECTION 8 OF ACT 187: "COMMENCED"

The Act then applies to the above described hearings, trials, and proceedings that are "commenced" on the effective date of the subsection. Once again Chapter 980 provides no guidance on what "commenced" is. It is has been widely viewed that a Chapter 980 proceeding

is a civil proceeding. See State v. Richard Brown, 215 Wis.2d 716, 722, 573 N.W.2d 884, 886-7 (Ct. App 1997), citing State v. Carpenter, 197 Wis.2d at 258, 541 N.W.2d at 107 (1995), also citing State v. Post, 197 Wis.2d at 294, 541 N.W.2d at 118 (1995). Given their civil nature, Wis. Stat. 801.01(2) provides that the procedures outlined in Chapters 801 to 847 Wis. Stats. automatically apply to a civil proceeding unless a different procedure or rule is prescribed by statute. See Brown, 215 Wis.2d 716, 724, 573 N.W.2d 884, 891 (Ct. App. 1997). Most importantly it is a fundamental canon of statutory construction that technical terms or terms of art are presumed to have been used with their technical meaning when used in a statute. State v. Grobarchik, 102 Wis.2d 461, 468; 307 N.W.2d 170 (1981).

Wis. Stat. 801.01(2) reads:

> **801.01(2)** SCOPE. Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule. Chapters 801 to 847 shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding.

Furthermore, Wis. Stat. 801.02 describes the commencement of a civil action:

> **801.02.** Commencement of action.
>
> (1) A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.
>
> (2) A civil action in which only an in rem or quasi in rem judgment is sought is commenced as to any defendant when a summons and a complaint are filed with the court, provided service of an authenticated copy of the summons and of either the complaint or a notice of object of action under s.801.12 is made upon the defendant under this chapter within 90 days after filing.

Wis. Stats. 801.02(7)(2)(a) also indicates that it applies to 980 actions by defining how a 980 committee may commence an action. Additionally, further guidance can be found in Chapter 893 Wis. Stats. regarding the meaning of when an action is commenced:

> 893.02. ACTION, when **commenced.**
>
> An action is **commenced**, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons, naming the defendant and the complaint are filed with the court, but no action shall be deemed **commenced** as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 90 days after filing.

It is the Respondent's position that the above clearly illustrate that for the purposes of Chapter 980 "commenced," means the filing and service of process. Thus, an original petition under 980.02 is "commenced" when the action is filed with the court and when Respondent is served. A supervised release petition under 980.08 is "commenced" when a release petition is filed and served. A discharge petition is "commenced" when a petition is filed under 980.09(1) or not waived at annual review pursuant to 980.09(2).

Given the above analysis, in the instant case, Respondent has a pending original petition that was commenced on the date that the petition was filed and served upon the Respondent.

The above analysis is not inconsistent with the case of State v. Wolfe, 246 Wis.2d 233, 631 N.W.2d 240 (C. App. 2001) which the State may offer as being incompatible with the above discussion regarding the meaning of "commenced." The issue of relevance in Wolfe centered around Wolfe's argument that the court lacked personal jurisdiction over him because the State failed in accordance with Chapter 801 to comply with the personal service requirements at the time of the filing of the State's petition. See Wolfe 246 Wis.2d at 258, 573 N.W.2d at 252 (Ct. App. 2001). In rejecting Wolfe's argument, the court held that Chapters 801 and 802 were not applicable because Chapter 980 provides its own procedure for the commencement of the

Chapter 980 action. See Wolfe 246 Wis.2d at 259, 573 N.W.2d at 253. The key is that Wolfe does nothing to undermine the Respondent's analysis of the meaning of "commenced." This is because while the Wolfe case did deal with commencement of a 980 action and the applicability of Wis. Stats. chs. 801 and 802, it was in the context of whether or not Chapter 980 provided its own procedures for commencement of the action, and therefore, the applicability of chs. 801 and 802 as it related to requirements of personal service. This does not mean that Ch. 801 is inapplicable to the question of the meaning of "commenced" in the context of Act 187. The issue is not proper procedure for the commencement of an action, but rather, an issue of the meaning of the term "commenced."

RETROACTIVITY OF ACT 187

It is presumed that the State will disagree in whole or part with the Respondent's above arguments regarding applicability of Act 187 as it relates to the meaning of "hearings, trials, and proceedings" as well as the meaning of "commenced."

Notwithstanding those arguments, the Respondent below does address the expected argument by the State of the intended retroactivity by the Legislature of the Act. The Respondent asserts that Act 187 is retroactive and its retroactive application would be unconstitutional as applied to him such that it is violative of due process.

In analyzing whether or not a statute has a retroactive effect, the working presumption is that legislation is prospective rather than retroactive "unless the statutory language reveals by express language or necessary implication an intent that it apply retroactively" See Matthies v. Positive Safety Mfg. Co., 244 Wis.2d 720, 735, 628 N.W.2d 842, 850 (2001), citing Chappy v. LIRC, 136 Wis.2d 172, 180, 401 N.W.2d. 568, 572 (1987).

In analyzing the applicability language of Section 8 of Act 187 and its possible retroactivity, it is necessary to consider when an action accrues: "A civil action must accrue before it can be commenced; and, a civil action is not commenced until a summons and

complaint is filed with the court." See Matthies, 244 Wis.2d at 735, 628 N.W.2d at 850, citing Martin by Scoptur v. Richards, 192 Wis.2d 156, 200, 531 N.W.2d 70, 88 (1995). Additionally, the court reiterated that "An existing right of action which has accrued under the rules of the common law or in accordance within its principles is a vested property right." See Matthies, 244 Wis.2d at 738, 628 N.W.2d at 853, citing Hunter v. School Dist. Gale-Ettrick-Trempealeau, 97 Wis.2d 435, 445, 293 N.W.2d 515 (1980). Employing the above analysis, it is clear that the accrual of Respondent's liberty interest and the procedures allowing the State to file a petition, attach 90 days prior to release from the institution. See Wis. State. 980.02(2)(ag).

Furthermore, Matthies addressed accrual of actions and retroactive applications of statutory provisions, highlighting that "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective." See Matthies, 244 Wis.2d at 740-1, 628 N.W.2d at 853, citing Welch v. Henry, 223 Wis. 319, 340, 271 N.W.68 (1937) (Fairchild, J., dissenting) (quoting Society for the Propagation of the Gospel v. Wheeler, Fed. Cas.No 13, 156, 2 Gall. 105, 139, 22 F.Case. 756).

The second step in the analysis, after a determination that the Legislature intended retroactivity, is whether the statute as applied to the Respondent has a retroactive effect. See Matthies, 244 Wis.2d 720 at 736, 628 N.W.2d 842 at 851. Respondent asserts that the application as applied to him is retroactive and deprives him of the legal standard in effect both when the petition seeking his commitment under Wis. Stat. ch. 980 was commenced by the filing of the petition and the accruement of the action 90 days prior to his release from the institution. The application of Act 187 results in a reduction of the legal standard for commitment from "much more likely than not" to "more likely than not" which lowers the

standard by which the trier of fact is to determine if the respondent is a sexually violent person and appropriate for institutional commitment.

RETROACTIVITY: DUE PROCESS ANALYSIS

If there is a determination that the Legislature intended retroactivity and that the statute has a retroactive effect as applied to the Respondent, the third step in the analysis is to consider the constitutionality of the retroactivity. See Matthies, 244 Wis.2d 720 at 743, 628 N.W.2d 842 at 856. This constitutional analysis is an analysis as to whether Act 187 applied retroactively meets the test of due process as guaranteed by both the United States and Wisconsin Constitutions. Furthermore, the Matthies Court emphasized that, while there is a presumption of constitutionality for retroactive legislation, such legislation should be viewed with "some degree of suspicion" given that "retroactive legislation presents unique constitutional problems in that if often unsettles important rights." See Matthies, 244 Wis.2d 720 at 743, 628 N.W.2d 842 at 855.

The due process analysis that should be undertaken requires the application of the balancing test as outlined in Martin by Scoptur v. Richards, 192 Wis.2d 156, 531 N.W.2d 70 (1995). See Matthies, 244 Wis.2d 720 at 743-4, 628 N.W.2d 842 at 855. This balancing test addresses whether there is a rational basis for the retroactive application of the statute, which necessitates a weighing of the public interest served by retroactivity against the private interest affected by the retroactivity. See id. Respondent notes that the Martin Court as well as the Court in Neiman v. American National Property and Casualty Co. 236 Wis. 2d 411, 613 N.W. 160 (2000) held that the Legislature's efforts to either increase (Neiman) or reduce (Martin) damage caps in civil tort cases where the claims had already accrued was violative of due process.

In applying the balancing test to the Respondent's case, Respondent asserts that his liberty interests are substantially impaired by the retroactive application of Act 187. The

retroactive application results in the reduction of the standard for commitment to institutional care from "much more likely than not" to "more likely than not." In the context of civil commitment, it is a long standing concept that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." See State v. Post, 197 Wis.2d. 279, 302, 541 N.W.2d 115, 122 (1995), citing Addington v. Texas, 441 U.S. 418, 425 (1979). Further, legislation which purports to restrict a fundamental liberty interest requires a strict scrutiny analysis such that the legislation must "further a compelling state interest and be narrowly tailored to serve that interest." See id, citing Roe v. Wade, 410 U.S. 113, 155 (1973). In Post, these state interests as it relates to a substantive due process analysis were outlined as being two-fold: (1) protection of the community from the dangerously mentally disordered and (2) providing care and treatment to those with mental disorders that predispose them to commit acts of sexual violence. See Post, 197 Wis.2d 279, 302-3, 541 N.W.2d 115, 122 (1995).

The Post Court addressed several substantive due process challenges to the Chapter 980 statute. In rejecting Post's due process challenges, the Court emphasized that Chapter 980 is narrowly tailored to address only those individuals "most in need of treatment" and the procedural due process protections afforded to a Respondent through post commitment reexaminations to ensure that "Commitment ends when the committed person no longer suffers from a mental disorder or when that condition no longer predisposes him to commit acts of sexual violence. See id, 197 Wis.2d at 309-315, 541 N.W.2d at 125-128.

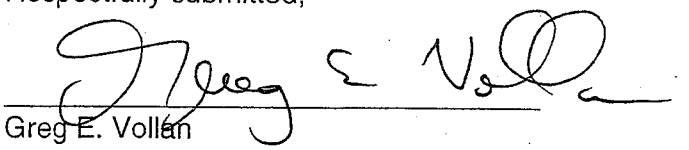
In applying the above concepts to the case at bar, it is clear that the retroactive application of Act 187 to the Respondent is violative of due process as the change in standard from "much more likely than not" to "more likely than not" has a constitutionally problematic impact as applied to the Respondent. First, the direct result of the lowering of the standard is that it provides for an impermissively broader opportunity for the potential commitment of the Respondent as a sexually violent person.

Secondly, the post commitment procedural due process protections emphasized by the Post Court are drastically compromised by the change in standard. This is because the purpose of the post commitment procedural due process protections are that they provide the vehicle by which a Respondent is reexamined such that his commitment to institutional care is not to be continued if he is found to be no longer a sexually violent person. However, the change in standard would now allow for continued commitment based upon a standard now lower than what was the basis for the State's pleadings in the original instance.

Thirdly, and most importantly, the Respondent has a vested right to be adjudged as to whether or not he is or is not appropriate for civil commitment under the "much more likely than not" standard in existence at the time that the action accrued. The State's pleadings and the procedure for the issuance of a detention order following a review of the State's pleadings pursuant to Wis. Stat. 980.04(1), in the present case, have all occurred employing the "much more likely than not standard." Retroactive application of the "more likely than not" standard at this stage of the proceedings would have an enormously profound effect upon the Respondent, namely, a potential finding that he is a sexually violent person and need of institutional care due to the application of the lower legal standard of "likely." Even in consideration of the State's interests as outlined above by the Post Court, these considerations do not outweigh the profound impairment of the Respondent's vested right in the "much more likely than not" standard should retroactivity of Act 187 be applied to the case at bar. This impairment is substantial and intricately tied to the Respondent's liberty interest as retroactive application of the Act allows now for the potential civil commitment of the Respondent by employing the lower legal threshold of "more likely than not."

Dated this 20th day of September, 2004.

Respectfully submitted,*



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* with assistance from assistant state public defenders Robert Peterson, Samantha Jeanne Humes and others.