



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON SEXUALLY VIOLENT PERSON
COMMITMENTS

FROM: Ronald Sklansky, Senior Staff Attorney

RE: Assembly Substitute Amendment 2 to 2003 Assembly Bill 861, Relating to Sexually Violent
Persons

DATE: September 13, 2004

2003 Assembly Bill 861, relating to the standard for commitment and supervised release of sexually violent persons, was introduced on February 19, 2004. Assembly Substitute Amendment 2 to the bill was offered on March 10, 2004, by Representatives Stone, Krug, and Staskunas. The bill, as amended, was passed by the Assembly on a voice vote on the same day. This Memo provides an overview of the major substantive provisions of Assembly Substitute Amendment 2. Since this proposal is the latest legislative statement on the topic of sexually violent persons, the substitute amendment may provide a starting point for the deliberations of the Special Committee on Sexually Violent Person Commitments. [Those portions of the substitute amendment that have been enacted as part of 2003 Wisconsin Act 187 are not described in this Memo. Act 187 amended the definition of sexually violent persons and criteria for supervised release and created a committee to make recommendations regarding the location of a facility for the treatment of sexual predators.]

SEXUALLY VIOLENT PERSON COMMITMENTS

Definitions

Current Law

Under current law, “sexually violent person” is defined as a person: (1) who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness; and (2) who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in acts of sexual violence. “Likely” is defined as more likely than not.

Under current law, “sexually violent offense” means first- or second-degree sexual assault, first- or second-degree sexual assault of a child, incest with a child, or child enticement. In addition, “sexually violent offense” includes first- or second-degree intentional homicide, first- or second-degree reckless homicide, aggravated battery, aggravated battery to an unborn child, false imprisonment, taking hostages, kidnapping, or burglary if determined to be sexually motivated. “Sexually motivated” means that one of the purposes for an act is for the actor’s sexual arousal or gratification.

The Substitute Amendment

The substitute amendment defines “act of sexual violence” to mean conduct that constitutes the commission of a sexually violent offense. [SEC. 55.]

The substitute amendment adds third-degree sexual assault to the list of sexually violent offenses. In addition, it adds felony murder, administering a dangerous or stupefying drug, robbery, and physical abuse of a child to the list of sexually violent offenses if such an offense is determined to be sexually motivated. The list of sexually violent offenses also is expanded to include comparable crimes committed prior to June 2, 1994. Under the substitute amendment, “sexually motivated” means that one of the purposes for an act is for the actor’s sexual arousal or gratification **or** for the sexual humiliation or degradation of the victim. [SECS. 57 to 61.]

Commencement of Commitment Proceedings

Current Law

Under current law, if an agency with jurisdiction (i.e., the agency with the authority or duty to release or discharge the person) has control or custody over a person who may meet the criteria for commitment as a sexually violent person, the agency must inform each appropriate district attorney (DA) and the Department of Justice (DOJ) regarding the person as soon as possible beginning three months prior to the applicable date of the following:

- The anticipated discharge from a sentence, anticipated release on parole or extended supervision or anticipated release from imprisonment of a person who has been convicted of a sexually violent offense.
- The anticipated release from a secure juvenile facility of a person adjudicated delinquent on the basis of a sexually violent offense.
- The termination or discharge of a person who has been found not guilty of a sexually violent offense by reason of mental disease or defect.

The Substitute Amendment

For persons under a sentence, the agency must inform the DA and DOJ regarding the person as soon as possible beginning 90 days before the date of the anticipated discharge or release on parole or extended supervision, or otherwise, from a sentence of imprisonment or term of confinement in prison that was imposed for a conviction for a sexually violent offense, from a continuous term of incarceration, any part of which was imposed for a sexually violent offense, or from a prison placement

under the intensive sanctions program, any part of which was imposed for a sexually violent offense. [SECS. 66 and 67.]

“Continuous term of incarceration, any part of which was imposed for a sexually violent offense” is defined to include confinement in a juvenile facility if the person was placed in the facility for being adjudicated delinquent on the basis of a sexually violent offense. [SEC. 65.]

The DA and DOJ must also be notified of the anticipated release on parole or discharge of a person committed under ch. 975, Stats. (the sex crimes in effect prior to the creation of ch. 980, Stats.), for a sexually violent offense. [SEC. 70.]

Filing a Commitment Petition

Current Law

Under current law, DOJ may file a petition to commit a person as a sexually violent person at the request of the agency with the authority or duty to release or discharge the person. If DOJ does not file a petition, the DA for the county in which the person was convicted, adjudicated delinquent, or found not guilty by reason of insanity or mental disease, defect, or illness, or the county in which the person will reside, may file the petition. The petition must be filed when the person is within 90 days of the person’s discharge or release.

The Substitute Amendment

Under the substitute amendment, the DA of the county in which the person is in custody may also file the petition. In addition, a juvenile court does **not** have jurisdiction over a petition involving a child and filing fees are eliminated. [SECS. 31, 73, and 78.]

Probable Cause Hearing

Current Law

Under current law, whenever a commitment petition is filed, the court must hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person is in custody, the court must hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays, and legal holidays. If the person is not in custody, the court must hold the hearing within a reasonable time after the filing of the petition.

The Substitute Amendment

Generally, the court must hold the probable cause hearing within 30 days, excluding Saturdays, Sundays, and legal holidays, after the filing of the petition, unless that time is extended by the court for good cause shown. [SEC. 89.]

If the person named in the petition is in custody and the probable cause hearing will be held after the date on which the person is scheduled to be released or discharged, the hearing must be held no later

than 10 days after the person's scheduled release or discharge date, excluding Saturdays, Sundays, and legal holidays, unless that time is extended by the court for good cause. [SEC. 90.]

Commencement of Trial on Commitment Petition

Current Law

A trial to determine whether the person who is the subject of a commitment petition is a sexually violent person must commence no later than 45 days after the date of the probable cause hearing. The court may grant a continuance of the trial date for good cause.

The Substitute Amendment

Under the substitute amendment, the trial must commence no later than 90 days after the probable cause hearing. The court may grant one or more continuances for good cause. [SEC. 92.]

Change of Venue

Current Law

Under current law, in most civil actions, the court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses.

The Substitute Amendment

The substitute amendment specifies that the general statutory provision does not apply to sexually violent person proceedings. Instead, the substitute amendment creates a change of venue procedure specific to these proceedings. The person who is the subject of a commitment petition or who has been committed as a sexually violent person may move for a change of the place of a jury trial on the ground that an impartial jury cannot be had in the county in which the trial is set to be held. If the court determines that there exists in the county such prejudice that a fair trial cannot be had, it must, with one exception, order that the trial be held in any county where an impartial trial can be had. Only one change may be granted and the judge who orders the change in the place of trial must preside over the trial. [SECS. 24 and 85.]

Alternatively, instead of changing the place of the trial, the court may order that the jury be selected in another county if all of the following apply:

- The court has decided to sequester jurors after the commencement of the trial.
- There are grounds for changing the place of the trial.
- The estimated costs to the county appear to be less using an alternate jury rather than changing the place of the trial. [SEC. 85.]

Experts for Examinations

Current Law

Under current law, whenever a person who is the subject of a commitment petition or who has been committed as a sexually violent person is required to submit to an examination, he or she may retain experts or professional persons to perform an examination.

The Substitute Amendment

The substitute amendment also provides that if a person who is the subject of a commitment petition denies the facts alleged in the petition, the court may appoint at least one qualified physician, psychologist, or other mental health professional to conduct an examination of the person's mental condition and testify at trial. [SEC. 84.]

The state may retain a physician, psychologist, or other mental health professional to: (1) examine the mental condition of a person who is the subject of a commitment petition or who has been committed; and (2) testify at the trial or any other sexually violent person proceeding at which testimony is authorized. [SEC. 84.]

Right to Remain Silent

Current Law

In general, under current law, at any hearing relating to a sexually violent commitment, the person who is the subject of the petition has the right to remain silent.

The Substitute Amendment

The substitute amendment does not affect the right to remain silent. However, under the substitute amendment, the state may present evidence or comment on evidence that a person who is the subject of a commitment petition or a person who has been committed refused to participate in an examination of his or her mental condition that was being conducted as part of a sexually violent person proceeding or that was conducted before the commitment petition was filed for the purpose of evaluating whether to file a petition. [SEC. 87.]

Hearings to Juries

Current Law

Under current law, the person who is the subject of a commitment petition, the person's attorney, DOJ, or the DA may request that the trial be to a jury of 12 in order to determine whether the person who is the subject of a commitment petition is a sexually violent person. The court may also, on its own motion, require that the trial be to a jury of 12. A verdict of a jury is not valid unless it is unanimous.

The Substitute Amendment

The substitute amendment provides for a jury of 12, but the parties may stipulate to a smaller number of jurors. [SEC. 94.]

The substitute amendment specifies that juries must be selected and treated in the same manner as they are selected and treated in civil actions in circuit court, except that each party is entitled to four peremptory challenges (instead of three, as for other civil actions), unless fewer jurors are to serve on the jury. [SEC. 94.]

The substitute amendment also provides a separate jury requirement for discharge hearings. Specifically, the DA or DOJ, whichever filed the original petition, or the petitioner may request that the discharge hearing be to a jury of six. A jury trial is deemed waived unless it is demanded within 10 days after the filing of the petition for discharge. No verdict is valid unless it is agreed to by at least five of the jurors. [SEC. 112.]

Discovery

Current Law

In general, under current law, in civil proceedings, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. Failure to comply with discovery requests may result in payment of expenses, evidentiary punishment, or contempt findings.

The Substitute Amendment

The substitute amendment [SEC. 86] includes provisions that are specific to discovery in proceedings relating to sexually violent persons and specifically provides that the general discovery process does not apply in ch. 980, Stats., proceedings. Under the substitute amendment, upon demand, a prosecuting attorney must disclose and permit the person or the person's attorney to inspect and copy or photograph all of the following if it is in the possession, custody, or control of the state:

- Any written or recorded statement made by the person concerning the allegations in a petition to commit the person as a sexually violent person or concerning other matters at issue in the trial or proceeding.
- A written summary of all oral statements of the person that the prosecuting attorney plans to use in the course of the trial or proceeding.
- Evidence obtained by intercepting any oral communication that the prosecuting attorney intends to use as evidence.
- A copy of the person's criminal record.

- A list of all witnesses whom the prosecuting attorney intends to call, except rebuttal or impeachment witnesses.
- Any relevant written or recorded statements of a witness.
- The results of any physical or mental examination or any scientific or psychological test or instrument, experiment, or comparison that the prosecuting attorney intends to offer in evidence and any raw data that were collected, used, or considered in any manner as part of the examination, test, experiment, or comparison.
- The criminal record of a witness for the state that is known to the prosecuting attorney.
- Any physical or documentary evidence that the prosecuting attorney intends to offer as evidence.
- Any exculpatory evidence.

Upon demand, the person who is subject to sexually violent person proceedings must disclose all of the following:

- A list of all witnesses whom the person intends to call.
- Any relevant written or recorded statements of a witness, except rebuttal or impeachment witnesses.
- The results of any physical or mental examination or any scientific or psychological test or instrument, experiment, or comparison that the person intends to offer as evidence and any raw data that were collected, used, or considered in any manner as part of the examination, test, experiment, or comparison.
- The criminal record of a witness for the person that is known to the person's attorney.
- Any physical or documentary evidence that the person intends to offer as evidence.

If, subsequent to compliance with these requirements, and prior to or during trial, a party discovers additional material or the names of additional witnesses, the party must promptly notify the other party of the existence of the additional materials or names.

The court must exclude any witness not listed or evidence not presented for inspection unless good cause is shown for failure to comply. The court may advise the jury of the nonresponsiveness of a party.

Confidential Juvenile, Pupil, Mental Health Commitment, and Patient Health Care Records

Current Law

Under current law, the following records are confidential and may be disclosed only to persons and entities specified in the statutes:

- Juvenile court records.
- Law enforcement records relating to juveniles.
- Pupil records.
- Reports of child abuse and neglect.

Also, under current law, the files and records of mental health court proceedings are closed but are accessible to any person who is the subject of a petition for involuntary commitment or other petition under ch. 51, Stats. (the Mental Health Act).

Patient health care records are confidential and may be released upon request without informed consent only under specified conditions.

The Substitute Amendment

Under the substitute amendment, such records are open for inspection by and production to authorized representatives of the Department of Corrections (DOC), the Department of Health and Family Services (DHFS), DOJ, or a DA for use in the evaluation or prosecution of any sexually violent person proceeding, if the records involve or relate to an individual who is the subject of or who is being evaluated for a sexually violent person proceeding. The court in which the proceeding is pending may issue any protective orders that it determines are appropriate concerning information that is made available or disclosed under this provision. Any representative of DOC, DHFS, DOJ, or a DA may disclose information obtained under this provision for any purpose consistent with any sexually violent person proceeding. [For example, SECS. 3, 4, 5, 8, 15, 17, 36, 38, and 81.]

Mental Health Registration and Treatment Records

Current Law

Treatment records of an individual may be released without informed consent under specified circumstances. Regarding sexually violent person proceedings, such records may be released to appropriate examiners and facilities for the examination of an individual who is the subject of a petition for commitment or for supervised release. The recipient of any information from the records must keep the information confidential except as necessary to comply with the provisions of the chapter relating to sexually violent person commitments.

Also, such records may be released to DOJ or a DA for a commitment petition if the treatment records are maintained by the agency that has custody or control over the person who is the subject of the petition.

The Substitute Amendment

Treatment records may be disclosed to a physician, psychologist, or other mental health professional retained by a party or appointed by the court to examine a person under the chapter relating to sexually violent person commitments or to authorized representatives of DOC, DHFS, DOJ, or a DA for use in the evaluation or prosecution of any sexually violent person proceeding, with the same limitations as provided for other confidential records, as described above. [SECS. 10 and 12.]

Admissibility of Juvenile Delinquency Dispositions

Current Law

The disposition of a juvenile, and any record of evidence given in a hearing in juvenile court, is not admissible as evidence against the juvenile in any case or proceeding in any other court except as specified under the statutes.

The Substitute Amendment

The substitute amendment creates an exception for a hearing, trial, or other sexually violent person proceeding relating to a juvenile. [SEC. 34.]

Privileged Communications With Health Care Providers

Current Law

Generally, a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental, or emotional condition, between the patient and a health care provider.

There is no privilege as to communications and information relevant to an issue in proceedings to hospitalize the patient for mental illness, to appoint a guardian, for court-ordered protective services, or for protective placement if the health care provider in the course of diagnosis or treatment has determined that the patient is in need of hospitalization, guardianship, protective services, or protective placement.

The Substitute Amendment

The substitute amendment includes in the privilege exception communications and information relevant to an issue in proceedings for control, care, and treatment of a sexually violent person. [SEC. 32.]

Presentence Reports

Current Law

After a conviction, the court may order a presentence investigation. It must be disclosed to the defendant's attorney (or the defendant, if unrepresented) and the DA prior to sentencing.

DOC may use the investigation report for correctional programming, parole consideration, or care and treatment.

The Substitute Amendment

The presentence investigation report and any information contained in it or upon which it is based may be used by any of the following persons in any evaluation, examination, referral, hearing, trial, post commitment relief proceeding, appeal, or other sexually violent person proceeding:

- DOC and DHFS.
- The person who is the subject of the presentence investigation report and his or her attorney.
- The attorney representing the state or an agent or employee of the attorney.
- A physician, psychologist, or other mental health professional who is examining the subject of the report.
- The court and, if applicable, the jury hearing the case. [SEC. 44.]

Reexamination, Supervised Release, and Discharge From Commitment

The substitute amendment combines current requirements for reexamination of committed persons, requirements for supervised release, and requests for discharge from commitment. Therefore, these provisions are described together.

Periodic Reexamination

- ***Current Law***

Under current law, DHFS must conduct an examination of the mental condition of each person who has been committed as a sexually violent person within six months of the initial commitment and every 12 months thereafter to determine whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged.

Any examiner conducting an examination must prepare a written report of the examination no later than 30 days after the date of the examination. The report must be placed in the person's medical records and a copy must be given to the court.

- ***The Substitute Amendment***

Under the substitute amendment, DHFS must conduct the examination within 12 months after the date of the initial commitment order and every 12 months thereafter. [SEC. 97.]

At the time of the examination, DHFS must prepare a treatment report based on its treating professionals' evaluation of the person's progress in treatment and of whether that progress has been sufficient and their description of the type of treatment that the person would need in the community if supervised release were ordered. A copy of the report must be given to the examiner. [SEC. 100.]

The examiner's report must include an assessment of the risk that the person will re-offend, whether the risk can be safely managed in the community if reasonable conditions of supervision and security are imposed, and whether the treatment that the person needs is available in the community. The report must be prepared no later than 30 days after the date of the examination and must be provided to DHFS. [SEC. 101.]

DHFS must send the treatment report, the written examination report, and a written statement from DHFS recommending either continued institutional care, supervised release, or discharge to the court. Copies of these documents must also be provided to the DA or DOJ and to the person's attorney. [SEC. 101.]

If the report concludes that the person does not meet the criteria for commitment as a sexually violent person, DHFS must petition for discharge, as described below. [SEC. 101.]

Requests for Supervised Release

- ***Current Law***

A person who is committed as a sexually violent person may petition the committing court to authorize supervised release if at least 18 months have elapsed since the initial commitment order was entered or at least six months have elapsed since the most recent release petition was denied or the most recent order for supervised release was revoked. The director of the facility at which the person is placed may petition on the person's behalf at any time.

Within 20 days after receiving the petition, the court must appoint one or more examiners who have specialized knowledge determined by the court to be appropriate, who must examine the person and furnish a written report to the court within 30 days after the appointment. If any examiner believes that the person is appropriate for supervised release, the examiner must report on the type of treatment and services that the person may need while in the community on supervised release.

The court, without a jury, must hear the petition within 30 days after the examiner's report is filed, unless the time limit is waived by the petitioner.

The court must 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 likely that the person will engage in acts of sexual violence if the person is not continued in institutional care.

In making this decision, the court may consider:

- The nature and circumstances of the behavior that was the basis of the allegation in the petition to commit the person.
- The person's mental history and present mental condition.
- Where the person will live.
- How the person will support himself or herself.
- What arrangements are available to ensure that the person has access to and will participate in necessary treatment, including pharmacological treatment if the person is a serious child sex offender.

If the court finds that the person is appropriate for supervised release, the court must notify DHFS. DHFS must make its best effort to arrange for placement of the person in a residential facility or dwelling that is in the person's county of residence.

DHFS and the county department in the county of residence must prepare a plan that does all of the following:

- Identifies the treatment and services, if any, that the person will receive in the community.
- Addresses the person's need, if any, for supervision, counseling, medication, community support services, residential services, vocational services, and alcohol and other drug abuse (AODA) treatment.
- Specifies who will be responsible for providing the treatment and services identified in the plan.

The plan must be presented to the court for its approval within 60 days after the court finding that the person is appropriate for supervised release, unless DHFS, the county department, and the person request additional time to develop the plan.

- ***The Substitute Amendment***

The substitute amendment creates a new process for granting supervised release. As noted above, DHFS must recommend continued institutional care, supervised release, or discharge through the reexamination process.

Within 30 days after the filing of the reexamination report, treatment report, and DHFS recommendation, the person subject to the commitment, the DA, or DOJ, may object to the recommendation by filing a written objection with the court.

If DHFS's recommendation is continued institutional care, and there is no objection, the recommendation is implemented without a hearing. If DHFS recommends discharge or the person files an objection requesting discharge, the court shall proceed with determining whether discharge is appropriate. Otherwise the court, without a jury, must hold a hearing to determine whether to authorize supervised release within 30 days after the date on which objections are due, unless the time limit is waived by the petitioner.

The court must determine from all of the evidence whether to continue institutional care and, if not, what the appropriate placement would be for the person while on supervised release. As under current law, in making this decision, the court may consider the following:

- The nature and circumstances of the behavior that was the basis of the allegation in the commitment petition.
- The person's mental history and present mental condition.
- The person's progress or lack of progress in treatment.
- If the court were to authorize supervised release, where the person would live, how the person would support himself or herself, and what arrangements would be available to ensure that the person would have access to and would participate in treatment.

The court must select a county to prepare a report on the person's prospective residential options. Unless the court has good cause to select another county, the court must select the person's county of residence.

The court must order the county department in the county of intended placement to prepare the report, either independently or with DHFS, identifying prospective residential options. In identifying prospective residential options, the county department must consider the proximity of any potential placement to the residence of other persons on supervised release and to the residence of persons who are in the custody of DOC and regarding whom a sex offender notification bulletin has been issued.

If the court determines that the prospective residential options identified in the report are inadequate, the court may, but is not required to, select one or more other counties to prepare a report.

The court may order that a person be placed on supervised release if it finds that all of the following apply:

- The person who will be placed on supervised release has made sufficient progress in treatment such that the risk that the person will reoffend can be safely managed in the community.
- That there is treatment reasonably available in the community and the person who will be placed on supervised release will be treated by a provider who is qualified to provide the necessary treatment in this state.
- The provider presents a specific course of treatment for the person who will be placed on supervised release, agrees to assume responsibility for the person's treatment, agrees to

comply with the rules and conditions of supervision imposed by the court and DHFS, agrees to report on the person's progress to the court on a regular basis, and agrees to report any violations of supervised release immediately to the court, DOJ, or the DA, as applicable.

- The person who will be placed on supervised release has housing arrangements that are sufficiently secure to protect the community, and the person or agency that is providing the housing to the person agrees in writing to accept the person, provide or allow for the level of safety the court requires, and, if the person or agency providing the housing is a state or local government agency or is licensed by DHFS, immediately report to the court and DOJ or the DA, as applicable, any unauthorized absence of the person from the housing arrangement.
- The person who will be placed on supervised release will comply with the provider's treatment requirements and all of the requirements that are imposed by DHFS and the court.
- DHFS has made provisions for the necessary services, including sex offender treatment, other counseling, medication, community support services, residential services, vocational services, and AODA treatment. [SEC. 103.]

Supervision of Persons on Supervised Release

- ***Current Law***

An order for supervised release places the person in the custody and control of DHFS. DHFS must arrange for control, care, and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the plan for supervised release. A person on supervised release is subject to the conditions set by the court and to DHFS rules.

If DHFS alleges that a person has violated any condition or rule, or that the safety of others requires that supervised release be revoked, he or she may be taken into custody under DHFS rules. DHFS must submit a statement showing probable cause of the detention and a petition to revoke the order for supervised release to the committing court and the regional office of the state public defender responsible for handling cases for that court's county within 72 hours after the detention.

The court must hear the petition within 30 days, unless the deadline is waived by the detained person. The state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated or that the safety of others requires that supervised release be revoked. If the court determines that any rule or condition of release has been violated or that the safety of others requires that supervised release be revoked, it may revoke the order for supervised release and order that the person be placed in an appropriate institution.

- ***The Substitute Amendment***

The substitute amendment modifies current law relating to revocation of supervised release. Under the substitute amendment, if DHFS concludes that a person on supervised release, or awaiting placement on supervised release, violated or threatened to violate a rule of supervised release, it may petition for revocation of the order granting supervised release.

As under current law, DHFS may detain a person for a violation or threatened violation. In addition, under the substitute amendment, if DHFS concludes that such a person is a threat to the safety of others, it must detain the person and petition for revocation of the order granting supervised release.

If DHFS concludes that the order granting supervised release should be revoked, it must file a statement alleging the violation and a petition to revoke the order with the committing court and provide a copy of each to the regional office of the state public defender within 72 hours after the detention. The court must hear the petition within 30 days, unless the hearing or time deadline is waived. A final decision on the petition must be made within 90 days of its filing.

If the court finds after a hearing, by clear and convincing evidence, that any rule has been violated and that the violation merits the revocation of the order granting supervised release, the court may revoke the order and order that the person be placed in institutional care. If the court finds by clear and convincing evidence that the safety of others requires that supervised release be revoked, the court must revoke the order granting supervised release and order that the person be placed in institutional care. [SEC. 104.]

Discharge From Commitment

- ***Current Law***

Under current law, if the Secretary of DHFS determines at any time that a person is no longer a sexually violent person, the Secretary must authorize the person to petition the committing court for discharge. The court must hold a hearing within 45 days after receipt of the petition. The hearing must be before the court without a jury. The state has the burden of proving by clear and convincing evidence that the person is still a sexually violent person.

If the court is satisfied that the state has not met its burden of proof, the petitioner must be discharged from the custody and supervision of DHFS. If the court is satisfied that the state has met its burden, the court may proceed to determine whether to modify the person's existing commitment order by authorizing supervised release.

A person may also petition the court for discharge from custody or supervision without the approval of the Secretary of DHFS.

At the time of the person's reexamination, the Secretary of DHFS must provide the person with written notice of the person's right to petition for discharge over the Secretary's objections. If the person does not affirmatively waive the right to petition, the court must set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is still a sexually violent person.

If the court determines at the probable cause hearing that probable cause exists to believe that the committed person is no longer a sexually violent person, then the court must set a hearing on the issue. The hearing must be to the court. The state has the right to have the person evaluated by experts chosen by the state. The state has the burden of proving by clear and convincing evidence that the committed person is still a sexually violent person. If the court is satisfied that the state has not met its burden of proof, the petitioner must be discharged from the custody and supervision of DHFS. If the court is

satisfied that the state has met its burden, the court may proceed to determine whether to modify the person's existing commitment order by authorizing supervised release.

- ***The Substitute Amendment***

The substitute amendment modifies the provisions relating to petitions for discharge that do not have DHFS's approval. The court must deny the petition without a hearing unless the petition alleges facts from which the court may conclude that the person's condition has changed so that the person does not meet the criteria for commitment as a sexually violent person. In determining whether such facts exist, the court must consider any current or past reports filed in connection with a reexamination, relevant arguments in the petition and in the state's written response, and any supporting documentation provided by the person or the state.

The court must hold a hearing within 90 days of the determination that the petition contains facts from which the court may conclude that the person does not meet the criteria for commitment as a sexually violent person. Upon request, the hearing may be to a jury of six. A verdict must be agreed to by at least five of the six jurors. The state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment. The substitute amendment specifies that the general rules of evidence are inapplicable at such hearings.

If the court is satisfied that the state has not met its burden of proof, the petitioner must be discharged from the custody and supervision of DHFS. If the court is satisfied that the state has met its burden, the court may proceed to determine whether to modify the person's existing commitment order by authorizing supervised release. [SECS. 111 and 112.]

Failure to Comply With Time Limits

The substitute amendment provides that failure to comply with any time limit specified in ch. 980, Stats., does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction. Failure to comply with any time limit is not grounds for an appeal or grounds to vacate any order, judgment, or commitment issued or entered. Failure to object to a period of delay or a continuance waives the time limit that is the subject of the period of delay or continuance. [SEC. 87.]

Immunity for Noncompliance With Sexually Violent Person Provisions

Current Law

Under current law, any agency or officer, employee or agent of an agency is immune from criminal or civil liability for any acts or omissions as the result of a good faith effort to comply with the requirement that an agency notify the DA or DOJ of the anticipated release or discharge of a person who may be a sexually violent person.

The Substitute Amendment

Under the substitute amendment, any agency or officer, employee or agent of an agency is immune from criminal or civil liability for any acts or omissions as the result of a good faith effort to

comply with any provision of the chapter governing sexually violent person commitments (ch. 980, Stats.). “Agency” means DOC, DHFS, DOJ, or a DA. [SECS. 71 and 118.]

ESCAPE

Current Law

Under current law, a person in custody who intentionally escapes from custody is guilty of a Class H felony, punishable by a fine not to exceed \$10,000 and a term of imprisonment and extended supervision not to exceed six years. “Custody” is defined as actual custody in an institution, including a secure juvenile facility. It does not include the custody of a probationer, parolee, or person on extended supervision unless the person is in actual custody.

The Substitute Amendment

The substitute amendment modifies the definition of “custody” to include actual custody in a facility used for the detention of persons committed as sexually violent persons. Under the substitute amendment, “custody” also includes without limitation the constructive custody of a person placed on supervised release.

Under the substitute amendment, a person who intentionally escapes from custody under the following circumstances is guilty of a Class F felony, punishable by a fine not to exceed \$25,000 and a term of imprisonment and extended supervision not to exceed 12 years and 6 months:

- While subject to a detention or custody order pending a petition to commit the person as a sexually violent person.
- While subject to an order committing the person to custody of DHFS, regardless of whether the person is placed in institutional care or on supervised release. [SECS. 39 and 40.]

DISTRICT ATTORNEYS

Current Law

Under current law, the DA in Brown County and the DA in Milwaukee County must each assign one assistant DA to be a sexually violent person commitment prosecutor. Those assistant DAs may file and prosecute sexually violent person commitment proceedings in any prosecutorial unit in the state.

The Substitute Amendment

If an assistant DA prosecutes or assists in the prosecution of a sexually violent person case in another prosecutorial unit, the prosecutorial unit in which the case is heard must reimburse the assistant DA’s own prosecutorial unit for his or her reasonable costs associated with the prosecution, including transportation, lodging, and meals. [SEC. 48.]

OTHER ITEMS

- Notwithstanding the normal process for gaining personal jurisdiction in a judicial proceeding, a court may exercise personal jurisdiction over the subject of a sexually violent person petition even though the person is not served under the normal process with a verified petition and summons or served with an order for detention and the person has not had a probable cause hearing. [SEC. 87.]
- A motion for post-commitment relief by a sexually violent person or an appeal from a final order or from an order denying a motion for post-commitment relief will follow criminal appellate procedure. An appeal by the state from a final judgment or order will follow the procedure for civil appeals. [SEC. 87.]
- Constitutional rights available to a defendant in a criminal proceeding are not necessarily available to the person who is the subject to a commitment petition. [SEC. 93.]

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