

**MEMORANDUM**  
**OFFICE OF THE STATE PUBLIC DEFENDER**

**STATE OF WISCONSIN**

**Date:** January 31, 2005

**To:** **MEMBERS OF THE SPECIAL COMMITTEE ON  
SEXUALLY VIOLENT PERSON COMMITMENT**

**From:** Krista Ginger, Wisconsin State Public Defender  
Legislative Liaison

**Subject:** Proposed re-draft language for Assembly Substitute  
Amendment 2 to 2003 Assembly Bill 861.

**Drafted by Joe Ehmann and Jefren Olsen,  
Office of the Wisconsin State Public Defender,  
Madison Appellate Office**

The following suggested revisions for some of the supervised release language address the concerns raised on pp. 5-6 of the accompanying Written Testimony regarding “*Reexamination, Supervised Release, and Discharge From Commitment.*” The references are to pages 39-46 of ASA 2 to 2003 AB 861. The proposed language creates a mechanism to ensure that a case moves forward after a report is filed, creates a trigger to ensure counsel is appointed, links the release criteria to the standards for commitment, and requires that revocation of supervised release be premised on new information.

A. Page 39 [Section 97], line 20:

Delete “a reexamination” and add “an examination.”

B. New section [98m] for page 40, following line 2:

Section 98m. 980.07 (1c) of the statutes is created to read:

980.07 (1c) (a) Before the department begins an examination under this section, it shall notify the committed person in writing that it is conducting the examination and that under sub. (1) (a) and (b) the person has the right to retain or have the court appoint an attorney and an examiner. The department shall certify to the court that committed the person that it has provided the notification required under this paragraph.

(b) The notification under par. (a) shall provide a statement for the person to sign if the person wants to waive the right to an attorney or to an examiner or both. If the person does not affirmatively waive the right to an attorney or an examiner within 5 days of the date of the notification, the department shall immediately notify the court that

committed the person that the person has not waived an attorney or an examiner and shall request the court to appoint an attorney or an examiner or both, whichever is applicable.

(c) Upon receiving notification from the department under par. (b) that a committed person has not waived the right to an attorney, the court shall immediately refer the matter to the authority for indigency determinations under s. 977.07 (1) and appointment of counsel under s. 977.05 (4) (j). Upon receiving notification from the department under par. (b) that a committed person has not waived the right to an examiner, the court shall also [insert language as to determination of indigency for purposes of appointing an examiner].

NOTE: This language requires an affirmative waiver of the right to an attorney and an independent examiner, a notice from the department to the court when the person does not waive, and appointment by the court upon receipt of the notice of non-waiver. This approach avoids delays in the annual examination process that will otherwise occur if counsel or an independent examiner is not appointed until after the report is completed and filed with the court. It also assures that a person has the immediate assistance of counsel in dealing with the new procedures for obtaining a supervised release hearing, especially important given ASA 2's requirement for a timely objection to a recommendation for continued institutional care.

C. Page 40, delete Section 100.

D. Pages 40-41, delete Section 101 and replace p. 40 line 15, to p. 41, line 6 with:

Section 101m. 980.07 (2) of the statutes is amended to read:

980.07 **(2)** Any examiner conducting an examination under ~~this section~~ sub. (1) shall prepare a written report of the examination no later than 30 days after the date of the examination. The examiner shall place a copy of the report in the person's medical records and shall provide a copy of the report to the department. The department shall then send the report and a written statement from the department recommending continued institutional care, supervised release, or discharge to the court that committed the person under s. 980.06. A copy of the report and the department's recommendation shall be provided to the committed person and his or her attorney, if applicable, and to the district attorney or department of justice, whichever is applicable. If the department concludes that the person does not meet the criteria for commitment as a sexually violent person, the department shall petition for discharge in accordance with the provisions of s. 980.09 (1).

Section 101t. 980.07 (2m) of the statutes is created to read:

980.07 **(2m)** A report prepared and filed under sub. (2) shall include all of the following:

(a) An evaluation of the person's progress in treatment while in institutional care and a description of the type of treatment that the person would need in the community if supervised release were ordered.

(b) An opinion as to whether the person still has a mental disorder and, if so, whether that mental disorder makes it likely that the person will engage in acts of sexual violence.

(c) An assessment of the level of risk that the person will engage in acts of sexual violence, 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.

NOTE: This language requires the person or his attorney, if applicable, to get a copy of the report so that an objection can be timely filed as provided under proposed s. 980.07(4). It also specifies that the examiner's report must address the standard for commitment, not simply the more amorphous assessment of a risk that the person will "re-offend," the standard contained in the current version of the draft (page 40, line 20). It also reflects the deletion of the report by the treatment providers, and instead requires the examiner to address treatment progress in his or her report.

E. Page 41, delete lines 8 to 11 in Section 102 and replace with:

980.07 **(3)** Notwithstanding sub. (1), the court that committed a person under s. 980.06 may order ~~a reexamination~~ an examination of the person at any time during the period in which the person is subject to the commitment order. An examination ordered under this subsection, and a report of the examination, shall conform with subs. (2) and (2m).

NOTE: This proposed change conforms the amendment to our proposed changes in the language about the examination report.

F. Page 41 [Section 103], line 13, delete "reexamination" and replace with "examination."

G. Page 43 [Section 103], delete first sentence of sub. (c), lines 17 to 20 and replace with:

(c) The court shall order the county department under s. 51.42 in the county of intended placement to prepare a report, either independently or in conjunction with the department of health and family services, identifying treatment providers and prospective residential options for community placement.

NOTE: This language requires the county's report to address treatment providers. Given that a court may not order supervised release without finding that there is treatment

available in the community, it is appropriate for the report to address this issue, and not only residential options.

H. Page 44 [Section 103], delete lines 4 to 9 and replace with:

(d) The court shall order that a person be placed on supervised release if it finds, based on all of the reports, trial records, and evidence presented, that all of the following apply:

1. Since the commitment under s. 980.06, there has been a sufficient change in circumstances such that the risk that the person will engage in acts of sexual violence can be safely managed in the community.

NOTE: This language specifies that a court *shall* (instead of “may”) order supervised release if all of the criteria are met. It also specifies that the supervised release decision is to be made based on the salient part of the standard for commitment—engaging in acts of sexual violence—and not on “progress in treatment” alone and not on the more amorphous assessment of a risk that the person will “re-offend,” the standard contained in the current version of the draft (page 44, line 8).

I. Page 46 [Section 104], line 9 delete “or threatened to violate.”

J. Page 46 [Section 104], delete lines 12 to 15 and replace with:

(b) If the department concludes, based on information not known at the time the court ordered supervised release, that a person on supervised release, or awaiting placement on supervised release, presents a risk of engaging in acts of sexual violence that can no longer be safely managed in the community, the department shall detain the person and petition for revocation of the order granting supervised release.

NOTE: This language specifies that a move to detain a person pending revocation of supervised release be premised on the salient part of the standard for commitment—engaging in acts of sexual violence—and not on being “a threat to the safety of others” alone, the standard contained in the current version of the draft (page 46, line 13). It also requires the department to act on new information, so that it cannot simply detain and re-litigate a supervised release hearing it has lost.