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

**Date:** January 31, 2005

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

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

**Subject:** **Written Testimony**/Comments regarding Assembly Substitute Amendment 2 to 2003 Assembly Bill 861.

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

The Joint Legislative Council's Special Committee on Sexually Violent Persons Commitments is currently reviewing Assembly Substitute Amendment 2 to 2003 Assembly Bill 861. At your request, I offer the following comments on various provisions in the bill. This is not an exhaustive analysis of the entire bill. Rather, it touches on some highlights. In a separate memo, I will offer alternative statutory language to address some of the problems I identified.

*I. Overview*

First, I concur with the comments from DHFS and DOC on ASA 2 to the effect that "any changes would have to be constitutional and not jeopardize Wisconsin's civil commitment law." The question is what would make the law unconstitutional? The Wisconsin Supreme Court found Ch. 980, as enacted in 1995, to be constitutional in *Carpenter* and *Post.* The court did, however, warn that it was assuming that those enforcing the statute would "proceed in good faith" and apply it only to a narrow set of offenders and for the limited permissible purpose of treatment and protection, not punishment or warehousing.

After Ch. 980 was amended by 1999 Act 9, the supreme court again found the law constitutional in *State v. Rachel*. However, Justice Bablitch, who voted to uphold the law in *Carpenter* and *Post,* joined the dissent in *Rachel* because "(1) the elimination of the option of supervised release at the time of commitment and (2) the tripling of the length of time an individual must wait to petition for supervised release…transform the former civil statutory scheme of ch. 980 to a punitive one and thereby violate the constitutional requirements of due process, double jeopardy, and in Rachel's case, ex post facto." And Justice Bradley, who authored *Carpenter*, cautioned in her concurring opinion in *Rachel* that the application of Ch. 980 in the "real world" is on "the brink of running afoul of the constitution" and that the court's assumptions about the government's good faith and good will "are wearing thin…." She wrote: "Chapter 980 cannot continue to survive

constitutional scrutiny if the predicates for its constitutionality prove to be false. The State must take steps to ensure that proper placement and treatment actually happen. When an individual committed under ch. 980 cannot be appropriately placed, or is not timely assessed, the viability and feasibility of treatment are called into question." She concluded that "What little doubt remains [regarding Ch. 980's unconstitutionality] continues to slip away."

Ch. 980 was again amended by 2003 Act 187. One provision, § 980.08 (4) (b) 2, which requires a court to deny supervised release if the state proves that the person has not demonstrated significant progress in treatment or has refused treatment, has been declared unconstitutional by the circuit court. The court found that the statute violates the constitutional guarantee of due process of law - because physical confinement is no longer linked to the person's dangerousness - and that the statutory language "significant progress in treatment" is unconstitutionally vague. The state has not appealed these rulings. *In re Hardy*, Milwaukee County Circuit Court Case No. 02-CI-02.

It is unclear how close the constitutional tipping point for Ch. 980 may be. Cases challenging 2003 Act 187 amendments have yet to reach the supreme court. The membership of the supreme court has changed. It is clear, however, that future amendments to Ch. 980 will be viewed by the courts in light of *Rachel* and the Act 187 litigation currently in the pipeline.

*II. The Proposed Amendments*

The following comments on specific provisions of ASA 2 track the order and format utilized in Legislative Council Staff Memo No. 1 to the Special Committee.

***SEXUALLY VIOLENT PERSONS COMMITMENTS***

***Definitions*** [Memo pp. 1-2]

Adding third-degree sexual assault to the list of sexually violent offenses and expanding the list of "sexually motivated" offenses may cast the SVP net too broadly. Third degree sexual assault offenses are often non-force, non-pedophilia crimes (for example, misconstrued consent) that do not fit into the SVP scheme contemplated in *Hendricks* and *Crane*. Actuarial instruments used in virtually all SVP assessments are not readily applicable to offenses that are sexually motivated but not sexually violent. Changing the definition of "sexually violent" does not change this—it confuses matters by putting the law at odds with the science. Also, there is a cost factor—if more crimes qualify for SVP status, more SVP screenings, prosecutions and commitments are likely to occur.

***Commencement of Commitment Proceedings*** [Memo pp.2-3]

The substitute amendment codifies *State v. Keith* and clarifies the law.

***Filing a Commitment Petition*** [Memo p. 3]

Allowing the DA of the county where a person is in custody to initiate Ch. 980 proceedings (in addition to DOJ and the DA in the county of conviction) raises arguable constitutional venue concerns [see Wis. Const. art. I, sec. 7]. The venue problem can be solved if § 980.05 (1m) is repealed. But repeal raises other constitutional concerns because the court has indicated § 980.05 (1m) is critical to its constitutional analysis. Also, allowing a third entity to prosecute shifts responsibility away from where it belongs, is unnecessarily redundant, and wastes criminal justice resources.

***Probable Cause Hearing*** [Memo p. 3]

The substitute amendment defines a "reasonable time" for conducting hearings (30 days or 10 days depending on circumstances) and thus clarifies the law.

***Commencement of Trial Commitment Petition*** [Memo p. 4]

Enlarging the time limit for commencing trial from 45 to 90 days after the probable cause hearing sets a more realistic goal and promotes efficiency by eliminating routine extensions. Extending the deadline longer would raise due process concerns.

***Change of Venue*** [Memo p. 4]

The substitute amendment keeps responsibility for Ch. 980 prosecution with the county of conviction (i.e. the judge follows the case). There are sound policy reasons for doing so. The "*Filing a Commitment Petition*" provision above, which allows a third prosecution entity (the DA in the county of confinement) to file the petition, will conflict with or undermine this policy.

***Experts for Examination*** [Memo p. 5]

This codifies current practice and clarifies the law.

***Right to Remain Silent*** [Memo p. 5]

The Legislative Staff Memo states: "The substitute amendment does not affect the right to remain silent." Case law, at least in the criminal context, holds otherwise. In *Doyle v. Ohio* the U.S. Supreme Court made clear that it violates the constitution to create a right (in that case, the right to remain silent in a criminal case) but then punish a person for exercising it. Allowing the state to comment on and argue inferences from exercise of the right to remain silent effectively eliminates the right. Our supreme court, in *Reichhoff v. State*, recognized that commenting on an accused person's silence has "a high potential for great prejudice to a defendant" and "low probative value" because such evidence is "insolubly ambiguous" and "does 'no more than turn on the red light of potential prejudice.'" Wisconsin law on this point pre-dates *Miranda* and is not dependent on federal case law or that of other jurisdictions.

As a practical matter, Ch. 980 evaluators and other experts are free to draw whatever inferences their professional judgment permits. Current law simply clarifies that the exercise of the right to silence cannot be revealed or argued at trial. This proposal is likely to trigger a significant amount of litigation. Courts may find a violation of the constitutional rights to equal protection and due process, because persons committed under ch. 51 have the right to remain silent [*Compare* Ch. 51.20(5) "hearings which are required to be held under this chapter shall conform to the essentials of due process and fair treatment including…the right to remain silent…."].

Changing the law in this manner, without requiring some warning to the person that exercising the "right" can be used against the person in court, is problematic and possibly unconstitutional.

***Hearing to Juries*** [Memo pp. 5-6]

Allowing all parties to stipulate to less than 12 jurors is fine. However, the committee might want to consider adding language clarifying that the decision to go to trial with fewer than 12 jurors is personal to the subject of the petition—i.e. something the person who is the subject of the petition, not his or her attorney, must waive.

***Discovery*** [Memo pp. 6-7]

This proposal replaces the current civil discovery model with what is, in effect, a criminal discovery model. This proposal is problematic from both a practical and constitutional perspective. Allowing a person facing commitment access only to the written reports and conclusions of the state's experts could in certain cases violate due process and possibly equal protection.

The current civil model is particularly appropriate for Ch. 980 proceedings because they are concerned with matters of subjective analysis and opinion rather than fact-based or empirical conclusions. The committee already heard testimony and received written materials from SRSTC Director Steve Watters that underscore why civil discovery is critical. As Mr. Watters indicated, SVP practice involves a "rapidly expanding and advancing field of research." The tools used now are very different from those used even five years ago. There is no standard practice or standard of practice. Experts may use unpublished materials, or apply non-conforming actuarial information or subjective clinical judgment. Civil discovery procedures, including interrogatories and depositions, are critical to ensure fair and full process. It also allows questions to be answered and matters to be resolved prior to the trial, thereby promoting efficiency through fewer or shorter trials.

The system in place now has worked well—in most cases neither depositions nor interrogatories occur. To my knowledge there has never been a Ch. 980 case in which abuse of the discovery process has been alleged. If it were to occur, existing law gives the courts ample means to deal with it.

***Confidential Juvenile, Pupil, Mental Health Commitment, and Patient Health Care Records*** [Memo pp. 8-9]

The provisions of the substitute amendment that eliminate patient confidentiality, grant broad access to treatment records, and affect the patient/health-care-provider privilege are likely to run afoul of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

If the provisions are rewritten to comply with HIPAA, the committee might consider requiring *in camera* review before any access is permitted; limiting disclosure or use to in-court proceedings (the current language gives DOC, DHFS, DOJ or a DA authority to disclose "for any purpose consistent with any SVP proceeding"); and including the person's counsel in the list of persons permitted access to records (*Compare* § 51.30(4)(b)11 granting access to treatment records to "the subject individual's counsel….").

Language regarding access to pupil records must conform to federal confidentiality law. Eliminating juvenile confidentiality suggests a larger question: whether Ch. 980 should apply at all to juveniles or to persons who only offended as juveniles. The standard actuarial instruments do not apply to juvenile offenders, the accuracy of the predictions upon which Ch. 980 commitments are based is questionable for younger individuals, and trials are problematic because the science as it relates to juvenile offenders is tenuous. One committee member (a prosecutor) raised the issue of possibly creating an entirely separate procedure outside Ch. 980 for alleged SVPs with juvenile-only offenses.

***Presentence Reports*** [Memo p. 10]

The substitute amendment allows broad access to PSI reports and is written in a way that could be interpreted to permit wide broadcast of the report. The committee may wish to consider language clarifying that the PSI remains a confidential document.

***Reexamination, Supervised Release, and Discharge From Commitment*** [Memo pp.10-16]

The proposed amendments to supervised release require DHFS to provide the court with a reexamination report (stating whether a person should be discharged or placed on supervised release). There is no procedure to move a case forward after the court receives a report. There is a right to counsel, but no trigger to ensure counsel is appointed.

Lengthening the reexamination time limit from 6 to 12 months after initial confinement makes the statute appear more punitive, and eliminates one factor that courts have relied upon to uphold the statute's constitutionality.

A statute that divorces the criteria for supervised release from the initial commitment criteria (e.g. making release contingent upon progress in treatment rather than a

continuing mental disorder predisposing one to re-offend) is problematic. An example would be a person who has done poorly in treatment, but who no longer has a qualifying mental disorder.

The substitute amendment equates the importance of a "treatment report" with that of the examination report. This is problematic because the treatment providers are not qualified to diagnose mental disorders, perform risk-assessments, or give an opinion about whether a person meets the criteria for commitment or release. This is the province of the examination group—currently Dr. Doren's group. The treatment report is something the examiner would consider and may include, if appropriate, with the written examination report which goes to the court, but it should not automatically be provided to a judge who is not qualified to interpret it or use it in its proper context.

I have offered alternate statutory language to address some of the issues or concerns with this portion of ASA 2 in the attached memo "Proposed re-draft language for ASA 2 to 2003 AB 861."

***Other Items*** [Memo p. 18]

- The proposed personal jurisdiction changes are fine.
- Bringing Ch. 980 appeals within Rule 809.30 procedures [sec. 87] is a critical change that will promote efficiency and harmonize the law. Current rules essentially attempt to fit a square peg in a round hole. That Ch. 980 appeals were not under Rule 809.30 procedures from the outset was an oversight, not a calculated decision. This small but critical change is one that courts, prosecutors and defense counsel all agree should occur.
- Eliminating the criminal constitutional protections for persons subject to Ch. 980 prosecutions is risky. Courts, at least in part, have been content to not give SVPs full mental commitment protections because they received full criminal constitutional protections.