NEW LAW RELATING TO CIVIL COMMITMENT OF SEXUALLY VIOLENT PERSONS (1993 WISCONSIN ACT 479)

Information Memorandum 94-21

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INTRODUCTION

This Information Memorandum describes 1993 Wisconsin Act 479, relating to civil commitment of sexually violent persons. This Act was signed into law on May 26, 1994 by Governor Tommy G. Thompson. The ***effective date*** of Act 479 is ***June 2, 1994.***

Copies of Act 479 may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400.

This Memorandum is divided into the following parts:

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PART I

KEY PROVISIONS OF 1993 WISCONSIN ACT 479

The key provisions of 1993 Wisconsin Act 479:

a. Create a procedure for the involuntary civil commitment of a "sexually violent person" (as defined in the Act) to a secure mental health facility prior to his or her release from the custody of the Department of Corrections (DOC) or the Department of Health and Social Services (DHSS) for commission of a "***sexually violent offense***" (as defined in the Act).

b. Define a "**sexually violent person**" as a person who has been convicted of, adjudicated delinquent for or found not guilty by reason of mental disease or defect for a sexually violent offense and who is dangerous because he or she suffers from a mental disorder (as defined in the Act) that makes it substantially probable that the person will engage in acts of sexual violence.

c. Permit the release of a person committed as a sexually violent person only when the state can no longer prove by clear and convincing evidence that the person is still a sexually violent person.

d. Allow the Department of Justice (DOJ), at the request of the DHSS or any other agency with jurisdiction over the person, to file a petition for commitment of a sexually violent offender no later than 30 days before the date of the release or discharge of the person. If the DOJ does not file such a petition, the Act permits either one of the following to file the petition: (1) the district attorney for the county in which the person was convicted of, adjudicated delinquent for or found not guilty by reason of mental disease or defect of a sexually violent offense (as defined in the Act); or (2) the district attorney for the county in which the person will reside or be placed upon discharge or release.

e. Expand current DOC and DHSS notice requirements to victims regarding the release of offenders who have been convicted of certain offenses, including sexually violent offenses.

f. Make the Act applicable to sexually violent offenses committed prior to the effective date of the Act as well as offenses committed on and after that date. That is, in general, the Act applies to any person who was confined or committed for a sexually violent offense on the effective date of the Act (June 2, 1994), regardless of the date of the person's offense.

PART II

BACKGROUND OF 1993 WISCONSIN ACT 479

A. HISTORY

On May 19, 1994:

1. May 1994 Special Session Assembly Bill 3 was introduced by the Joint Committee on Finance, by request of Governor Tommy G. Thompson. The Joint Committee reported adoption of Assembly Amendments 1 (Ayes, 15; Noes, 0), 2 (Ayes, 14; Noes, 1) and 3 (Ayes, 15; Noes, 10).

2. The Assembly adopted Assembly Amendments 1, 2 (as amended by Assembly Amendment 1) and 3. The Assembly then passed the Bill, as amended, on a vote of Ayes, 93; Noes, 2.

3. The Senate concurred in the Bill, as amended by the Assembly, on a vote of Ayes, 30; Noes, 3.

4. May 1994 Special Session Assembly Bill 3 was approved and signed by the Governor, with several minor vetoes, on May 26, 1994, and was published on June 1, 1994 as 1993 Wisconsin Act 479. The effective date of the Act is June 2, 1994.

B. CURRENT INVOLUNTARY COMMITMENT STANDARDS UNDER CH. 51, STATS.

1. Four Standards of Dangerousness

Under current Wisconsin law, in general, for a person to be subject to ***involuntary*** commitment under ch. 51, Stats. (the Mental Health Act), the person must:

a. Be mentally ill, drug dependent or developmentally disabled;

b. Be a proper subject for treatment; and

c. ***Satisfy one of four standards of dangerousness.***

The standards of dangerousness are set forth in s. 51.20 (1) (a) 2, Stats., which provides that a person is ***dangerous*** if he or she:

a. Evidences a ***substantial probability*** of ***physical harm to himself or herself*** as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.

b. Evidences a ***substantial probability*** of ***physical harm to other individuals*** as manifested by: (1) evidence of recent homicidal or other violent behavior; or (2) evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

c. Evidences such ***impaired judgment***, manifested by evidence of a pattern of recent acts or omissions, that there is a ***substantial probability*** of physical impairment or injury to himself or herself. The probability of physical impairment or injury is ***not*** substantial under this standard: (1) if reasonable provision for the subject individual's protection ***is available in the community*** and there is a reasonable probability that the individual will avail himself or herself of these services; (2) if the individual is appropriate for protective placement under s. 55.06, Stats.; or (3) in the case of a minor, if the individual is appropriate for services or placement under s. 48.13 (4) or (11), Stats.

d. Evidences behavior manifested by recent acts or omissions that, due to mental illness, he or she is ***unable to satisfy basic needs*** for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. No substantial probability of harm under this standard exists: (1) if reasonable provision for the individual's treatment and protection ***is available in the community*** and there is a reasonable probability that the individual will avail himself or herself of these services; (2) if the individual is appropriate for protective placement under s. 55.06, Stats.; or (3) in the case of a minor, if the individual is appropriate for services or placement under s. 48.13 (4) or (11), Stats.

2. Procedure

a. Petition

Under current law, a petition for examination for involuntary commitment must be signed by at least three adults, at least one of whom has personal knowledge of the conduct of the person to be committed. The petition must allege that the person satisfies the statutory standards for involuntary commitment cited in item 1, above.

b. Probable Cause and Final Hearings

The person who is named in the petition is first given a hearing to determine if there is probable cause to believe the allegations of the petition. If the court finds probable cause, a final hearing on commitment must be held within 30 days.

c. Finding; Periods of Commitment

A person who is found at the final hearing to be mentally ill, drug dependent or developmentally disabled, to be a proper subject for treatment and to satisfy at least one of the four standards of dangerousness, may be involuntarily committed to the care and custody of a county

department of community programs or developmental disabilities services for appropriate treatment. In general, the first final order of commitment is for a period of up to six months and all subsequent orders of commitment are for a period of up to one year, although other commitment periods exist for inmates of a state prison, county jail or house of correction [s. 51.20, Stats.].

C. POSSIBLE EFFECTS OF WISCONSIN LAW BASED ON EXPERIENCE UNDER WASHINGTON STATE LAW ON "SEXUAL PREDATORS"

In its analysis of May 1994 Special Session Senate Bill 3 (which is identical to Special Session Assembly Bill 3, which, as amended, became Act 479), the Legislative Fiscal Bureau notes:

> In its fiscal note submitted to Special Session Senate Bill 3, H&SS estimates that between eight and ten persons would be committed as sexually violent persons annually, based on the experience of the State of Washington, which enacted a similar "sexual predator" law in 1990. In Washington, nine persons were committed during the first year after the law was enacted. According to DOC, Washington estimates a population in 1994-95 of 36 individuals. Washington State has not yet released a person committed as a "sexual predator" on supervised release. The Washington State Department of Corrections believes that there has been some increase in participation in sex offender treatment programs by inmates who are sexual offenders since the enactment of the sexual predator law.
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> Data provided by the Wisconsin Sentencing Commission indicates that up to 114 individuals annually might be affected under the bill. This estimate is based on individuals who were sentenced for first- and second-degree sexual assault, and first- and second-degree sexual assault of a child, who have objectively measurable emotional or mental problems (for example, a mental illness diagnosis, mental retardation or suicide attempts). It is likely that not all of the individuals identified by the Sentencing Commission would meet the "dangerous" standard required under the bill, that is an individual who: (a) has a mental disorder; and (b) is substantially probable to engage in acts of sexual violence. The Commission's data does not include certain other crimes that may have been sexually motivated and, therefore, may be subject to commitment [Legislative Fiscal Bureau Paper, *Special Session Senate Bill 3: Civil Commitment of Sexually Violent Persons*, page 2 (May 18, 1994)].

It should be noted that in In re Personal Restraint of Young, 122 Wash. 2d 1, 857 P. 2d 989 (Wash. S. Ct. 1993), the Supreme Court of Washington upheld that state's Sexually Violent Predator Law, holding that the law is civil in nature and does not violate constitutional provisions relating to ex post facto laws (e.g., a new criminal penalty for an offense made applicable to a person previously convicted and sentenced for that offense), double jeopardy, substantive due process and equal protection.

PART III

DETAILED DESCRIPTION OF 1993 WISCONSIN ACT 479

1993 Wisconsin Act 479 (hereafter, "the Act") creates a procedure for the involuntary civil commitment of certain persons who are found to be "sexually violent persons" by creating new ch. 980 of the statutes, entitled ***Sexually Violent Person Commitments***.

A. DEFINITION OF "SEXUALLY VIOLENT PERSON" AND "SEXUALLY VIOLENT OFFENSE"

Act 479 defines "sexually violent person" to mean a person who meets the following criteria:

1. The person 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***;

2. The person is ***dangerous*** because he or she suffers from a ***mental disorder*** that makes it ***substantially probable*** that the person will engage in ***acts of sexual violence***. "Mental disorder" is defined to mean a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

The Act defines "***sexually violent offense***" to mean ***any*** of the following offenses:

1. First- or second-degree sexual assault [s. 940.225 (1) and (2), Stats.]. In general, these offenses involve sexual assault that causes great bodily harm or other injury or that involves the use or threat of use of a dangerous weapon or of force or violence.

2. First- or second-degree sexual assault of a child [s. 948.02 (1) or (2), Stats.], engaging in repeated acts of sexual assault of the same child [s. 948.025, Stats.], incest with a child [s. 948.06, Stats.] or enticement of a child [s. 948.07, Stats.].

3. ***If the offense was sexually motivated***, first- or second-degree intentional or reckless homicide [s. 940.01, 940.02, 940.05 or 940.06, Stats.], aggravated battery [s. 940.19 (4) or (5)], false imprisonment [s. 940.30, Stats.], hostage-taking [s. 940.305, Stats.], kidnapping [s. 940.31, Stats.] or burglary [s. 943.10, Stats.]. The Act defines "***sexually motivated***" to mean that one of the purposes for an act is for the actor's sexual arousal or gratification. The Act specifies that it must be determined, in a proceeding under Section F, below, that the offense was sexually motivated.

4. Any solicitation, conspiracy or attempt to commit a crime under items 1 to 3, above.

Under *current law*:

1. First-degree sexual assault and engaging in repeated acts of sexual assault of the same child are Class B felonies, punishable by imprisonment not to exceed 40 years.

2. Second-degree sexual assault is a Class C felony, punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.

3. Intentional homicide, kidnapping and hostage-taking are punishable by up to 40 years imprisonment (if a Class B felony) or life imprisonment (if a Class A felony), depending on the circumstances. Reckless homicide and burglary are punishable by a fine of up to $10,000 and imprisonment of up to 10 years (if a Class C felony), or both, or by imprisonment up to 40 years (if a Class B felony), depending on the circumstances.

4. Aggravated battery, incest with a child and child enticement are Class C felonies, punishable by a fine of up to $10,000 or imprisonment of up to 10 years, or both.

5. False imprisonment is a Class E felony (punishable by a fine of up to $10,000 and imprisonment of up to two years, or both).

B. NOTICE TO THE DEPARTMENT OF JUSTICE AND DISTRICT ATTORNEY

Under Act 479, if an "***agency with jurisdiction***" (defined in the Act to mean the agency with the authority or duty to release or discharge the person; in general, DOC or DHSS) has control or custody over a person who may meet the criteria for commitment as a sexually violent person, the agency with jurisdiction is ***required*** to inform each appropriate district attorney and the DOJ regarding the person as soon as possible ***beginning three months prior to the applicable date of the following***:

1. ***Discharge of convicted person.*** The anticipated discharge from a sentence, anticipated release on parole or anticipated release from imprisonment of a person who has been convicted of a sexually violent offense.

2. ***Release of adjudicated delinquent.*** The anticipated release from a juvenile secured correctional facility, as defined in s. 48.02 (15m), Stats. (Ethan Allen), of a person adjudicated delinquent under s. 48.34, Stats., on the basis of a sexually violent offense.

3. ***Discharge of person not guilty by reason of mental disease or defect.*** 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 under s. 971.17, Stats.

The agency with jurisdiction must provide the district attorney and DOJ with ***all of the following***:

1. The person's name, identifying factors, anticipated future residence and offense history.

2. If applicable, documentation of any treatment and the person's adjustment to any institutional placement.

The Act provides that any agency or officer, employe 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 this notice requirement.

C. SEXUALLY VIOLENT PERSON PETITION; CONTENTS; FILING

1. Who May File the Petition

Act 479 specifies that a petition alleging that a person is a sexually violent person may be filed by one of the following:

a. The ***DOJ***, at the request of the agency with jurisdiction over the person, as defined in Section B, above. If the DOJ decides to file a petition under this provision, it is required to file the petition before the date of the release or discharge of the person.

b. If the ***DOJ*** does ***not*** file a petition under item a, above, the ***district attorney*** for one of the following:

(1) The county in which the person was ***convicted*** of a sexually violent offense, ***adjudicated delinquent*** for a sexually violent offense or ***found not guilty of or not responsible*** for a sexually violent offense ***by reason of insanity or mental disease, defect or illness.***

(2) The county in which the person ***will reside or be placed upon his or her discharge*** from a sentence, release on parole, release from imprisonment, release from a juvenile secured correctional facility or release from a commitment order.

2. Allegation That a Person Is a Sexually Violent Person

Under the Act, the petition must allege that ***all of the following*** apply to the person alleged to be a sexually violent person:

a. The person satisfies ***any*** of the following criteria:

(1) The person has been ***convicted*** of a sexually violent offense.

(2) The person has been ***found delinquent*** under ch. 48, Stats. (the Children's Code), for a sexually violent offense.

(3) The person has been ***found not guilty*** of a sexually violent offense ***by reason of mental disease or defect.***

b. The person is ***within 90 days of discharge or release, on parole or otherwise***: (1) ***from a sentence*** that was imposed for a conviction for a sexually violent offense; (2) ***from a juvenile secured correctional facility***, if the person was placed in the facility for being adjudicated delinquent under s. 48.34, Stats., on the basis of a sexually violent offense; or (3) ***from a commitment order*** under s. 971.17, Stats., that was entered as a result of a sexually violent offense.

c. The person has a ***mental disorder.***

d. The person is ***dangerous to others*** because the person's mental disorder creates a ***substantial probability*** that he or she will engage in acts of sexual violence.

3. Other Requirements in Petition

The Act provides that the petition must also:

a. State with particularity essential facts to establish probable cause to believe the person is a sexually violent person.

b. If the petition alleges that a sexually violent offense or act that is a basis for the allegation under item 2, a, above, was an act that was ***sexually motivated***, state the grounds on which the offense or act is alleged to be sexually motivated.

4. Filing Petition

The Act specifies that the petition must be filed in any of the following:

a. The circuit court for the county in which the person was ***convicted*** of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of a sexually violent offense by reason of mental disease or defect.

b. The circuit court for the county in which the person ***will reside or be placed upon his or her discharge*** from a sentence, release on parole, release from imprisonment, release from a secured juvenile correctional facility or release from a commitment order.

c. The circuit court for the county in which the person ***is in custody*** under a sentence, a placement to a juvenile secured correctional facility or a commitment order.

D. RIGHTS OF PERSONS SUBJECT TO SEXUALLY VIOLENT PERSON PETITION

1. Rights in General

Under Act 479, the circuit court in which a sexually violent person petition is filed must conduct all of the hearings relevant to that petition. The court: (1) must give the person who is the subject of the petition ***reasonable notice*** of the time and place of each such hearing; and (2) may designate additional persons to receive these notices.

Except as provided in Sections K and L, below (relating to petitions for discharge), and without limitation by enumeration, at any such hearing, the person who is the subject of the petition has the right to:

a. Counsel. If the person claims or appears to be indigent, the court must refer the person to the State Public Defender, the authority for indigency determinations under s. 977.07 (1), Stats., and, if applicable, the appointment of counsel.

b. Remain silent.

c. Present and cross-examine witnesses.

d. Have the hearing recorded by a court reporter.

2. Right to Jury Trial; Unanimous Verdict Required

The person who is the subject of the petition, the person's attorney, the DOJ or the district attorney may request that a trial under Section F, below, be to a ***jury of 12***, with the request for a jury trial being made as provided in that section. If a jury trial is not requested, the ***court*** may ***on its own motion*** require that the trial be to a jury of 12. ***A verdict of a jury in a "sexually violent person" case is not valid unless it is unanimous.***

3. Right to Retain Experts to Perform Examination Under New Ch. 980

Whenever the person who is the subject of the petition is required to submit to an examination under the new ch. 980, he or she may retain experts or professional persons to perform an examination. If the person retains a qualified expert or professional person of his or her own choice to conduct an examination, the examiner must have reasonable access to the person for the purpose of the examination, as well as to the person's past and present ***treatment records***, as defined in s. 51.30 (1) (b), Stats., and ***patient health care records*** as provided under s. 146.82 (2) (c), Stats. If the person is ***indigent***, the court is required, upon the person's request, to appoint a qualified and available expert or professional person to perform an examination and participate in a trial on the person's behalf. Upon the order of the circuit court, the county shall pay, as part of

the costs of the action, the costs of a court-appointed expert or professional person to perform an examination and participate in a trial on behalf of an indigent person. The Act also specifies that:

a. An expert or professional person appointed to assist an indigent person who is subject to a petition may not be subject to any order by the court for the sequestration of witnesses at any proceeding under new ch. 980, created in the Act.

b. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), Stats., testimony may be received into the record of a hearing under this provision ***by telephone or live audio-visual means.***

E. DETENTION; PROBABLE CAUSE HEARING; TRANSFER FOR EXAMINATION

1. Detention

Under Act 479, upon the filing of the petition, the court must review the petition to determine whether to issue an order for detention of the person who is the subject of the petition. The person must be detained only if there is cause to believe that the person is eligible for commitment under Section F, 6, below. A person detained must be held in a facility approved by the DHSS. If the person is serving a sentence of imprisonment, is in a juvenile secured correctional facility or is committed to institutional care and the court orders detention under this provision, the court must order that the person be transferred to a detention facility approved by the DHSS. A detention order under this provision remains in effect until the person is discharged after a trial under Section F, below, or until the effective date of a commitment order under Section G, below, whichever is applicable.

2. Probable Cause Hearing; Time Limits

Whenever a "sexually violent person" 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 named in the petition 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 named in the petition is ***not in custody***, the court must hold the probable cause hearing ***within a reasonable time*** after the filing of the petition.

3. Probable Cause Determination; Evaluation

a. ***If probable cause found.*** If the court determines after a hearing that ***there is probable cause*** to believe that the person named in the petition is a sexually violent person, the court must: (1) order that the person be taken into custody if he or she is not in custody; and (2) must order the person to be transferred within a reasonable time to an appropriate facility for ***an evaluation as to whether the person is a sexually violent person.*** The Act requires the DHSS to promulgate rules that provide the qualifications for persons conducting such evaluations.

b. ***If no probable cause found.*** If the court determines that ***probable cause does not exist*** to believe that the person is a sexually violent person, the court must dismiss the petition.

4. Indigency Determination and Appointment of Counsel

If the person named in the petition claims or appears to be ***indigent***, the court must, prior to the probable cause hearing, refer the person to the State Public Defender to determine indigency and the need for appointment of counsel.

F. TRIAL

1. Time Limit for Commencement; Continuance

Under Act 479, a trial to determine whether the person who is the subject of the petition is a sexually violent person must commence ***no later than 45*** days after the date of the probable cause hearing under Section E, above. The court may grant a continuance of the trial date for good cause upon its own motion, the motion of any party or the stipulation of the parties.

2. Rules of Evidence; Constitutional Rights

The Act specifies that, at the trial, all rules of evidence in criminal actions apply and all constitutional rights available to a defendant in a criminal proceeding are available to the person.

3. Request for Jury Trial; Withdrawal of Request

The person who is the subject of the petition, the person's attorney, the DOJ or the district attorney may request that the trial be to a jury of 12. ***A request for a jury trial*** under this provision shall be made ***within 10 days after the probable cause hearing*** under Section E, above. If no request is made, the trial must be to the court. The person, the person's attorney or the district attorney or DOJ, whichever is applicable, may withdraw his, her or its request for a jury trial if the two persons who did not make the request consent to the withdrawal.

4. Burden of Proof at Trial

At the trial, the petitioner (i.e., the state) has the burden of proving the allegations in the petition ***beyond a reasonable doubt.*** If the state alleges that the sexually violent offense that forms the basis for the petition was an act that was "***sexually motivated,***" the state is required to prove ***beyond a reasonable doubt*** that the alleged sexually violent act was sexually motivated. As noted in Section A, above, "sexually motivated" is defined in the Act to mean that one of the purposes for an act is for the actor's sexual arousal or gratification.

5. Evidence of Prior Convictions or Commitments

Evidence that the person who is the subject of the petition 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.

6. Determination That a Person Is or Is Not a Sexually Violent Person

If the court or jury determines that the person who is the subject of the petition ***is*** a sexually violent person, the court must enter a judgment on that finding and must commit the person as provided under Section G, below. If the court or jury ***is not*** satisfied beyond a reasonable doubt that the person is a sexually violent person, the court must dismiss the petition and direct that the person be released unless he or she is under some other lawful restriction.

7. Appeal of Judgment Permitted

The Act specifies that a judgment that the person is a sexually violent person is interlocutory to a commitment order under Section G, below, and is reviewable on appeal.

G. COMMITMENT: INSTITUTIONAL CARE OR SUPERVISED RELEASE

1. Order for and Length of Commitment

Under Act 479, if a court or jury determines that the person is a sexually violent person, the court must order the person to be committed to the custody of the DHSS for control, care and treatment ***until such time as the person is no longer a sexually violent person.***

2. Initial Commitment Order

The court must enter an initial commitment order pursuant to a hearing held as soon as practicable after the judgment that the person is a sexually violent person is entered. If the court lacks sufficient information to make the determination required by item 3, below, immediately after trial, it may adjourn the hearing and order the DHSS to conduct a ***predisposition investigation*** using the procedure in s. 972.15, Stats., or a supplementary mental examination, or both, to assist the court in framing the commitment order. A supplementary mental examination must be conducted in accordance with s. 971.17 (2) (b) to (f), Stats.

3. Type of Commitment

a. ***Determination of Institutional Care or Supervised Release; "Least Restrictive" Requirement.*** An order for commitment must specify either: (1) institutional care in a secure mental health unit or facility or other facility; or (2) supervised release. In determining whether commitment must be for institutional care in a secure mental health facility or other facility or for supervised release, the court may consider, without limitation because of enumeration:

(1) The nature and circumstances of the behavior that was alleged in the petition;

(2) The person's mental history and present mental condition;

(3) Where the person will live;

(4) How the person will support himself or herself; and

(5) What arrangements are available to ensure that the person has access to and will participate in necessary treatment.

The DHSS 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 court's commitment order.

b. ***Supervised Release: Plan for Treatment and Services.*** If the court finds that the person is appropriate for ***supervised release***, the court must notify the DHSS. The DHSS and the county department under s. 51.42, Stats. (often referred to as the "51.42 board") in the county of residence of the person must prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The Act specifies that:

(1) The plan must address the person's need, if any, for supervision, counseling, medication, community support services, residential services, vocational services and alcohol or other drug abuse treatment.

(2) The DHSS may contract with a county department, under s. 51.42 (3) (aw) 1. d., Stats., with another public agency or with a private agency to provide the treatment and services identified in the plan.

(3) The plan must specify who will be responsible for providing the treatment and services identified in the plan.

(4) The plan must be presented to the court for its approval ***within 21 days*** after the court finding that the person is appropriate for supervised release, unless the DHSS, the county department and person to be released request additional time to develop the plan.

(5) If the county department of the person's county of residence ***declines to prepare a plan***, the DHSS may arrange for another county to prepare the plan if that county agrees to prepare the plan and if the person will be living in that county. If the DHSS is unable to arrange for another county to prepare a plan, the court is required to designate a county department to prepare the plan, order the county department to prepare the plan and place the person on supervised release in that county.

c. ***Supervised Release: Notification; Hearing on Revocation if Violation Condition or Rule.*** An order for supervised release places the person in the custody and control of the DHSS. A person on supervised release is subject to the conditions set by the court and to the rules of the DHSS. Before a person is placed on supervised release by the court, the court must so ***notify*** the municipal police department and county sheriff for the municipality and county in which the person will be residing. The notification requirement does not apply if a municipal police department or county sheriff submits to the court a written statement waiving the right to be notified.

If the DHSS alleges that a released 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 the rules of the DHSS. The DHSS must submit a statement showing probable cause for 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 in the county where the committing court is located ***within 48 hours after the detention.*** The court must hear the petition ***within 30 days,*** unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the DHSS may detain the person in a jail or in a hospital, center or facility specified by s. 51.15 (2), Stats.

At the revocation hearing, 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 after hearing 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 released person be placed in an appropriate institution until the person is: (1) discharged from the commitment under Section K, below; or (2) again placed on supervised release under Section J, below.

H. SECURE MENTAL HEALTH UNIT OR FACILITY FOR SEXUALLY VIOLENT PERSONS

Act 479 specifies that:

1. The DHSS must place a person committed to a secure mental health unit or facility under Section G, above, at one of the following:

a. The Wisconsin Resource Center established under s. 46.056, Stats.

b. A secure mental health unit or facility provided by the DOC under item 2, below.

2. The DHSS may contract with DOC for the provision of a secure mental health unit or facility for persons committed under Section G, 3, above, to a secure mental health unit or facility. The Act specifies that DHSS is required to operate the secure mental health unit or facility provided by DOC and must promulgate rules governing the custody and discipline of persons placed in the unit or facility provided by DOC.

The Act appropriates general program revenue of ***$364,000*** in fiscal year 1994-95 for the general program operations of these secure mental health units or facilities by DHSS.

I. PERIODIC REEXAMINATION; REPORT; USE OF EXPERTS

Under Act 479, if a person has been committed under Section G, above, and has not been discharged under Section K, below, the DHSS ***must*** conduct an examination of his or her mental condition: (a) ***within six months*** after an initial commitment under Section G, above; and (b) again thereafter at least ***once each 12 months***. The examination is for the purpose of determining whether the person has made sufficient progress to be entitled to transfer to a less restrictive facility, to supervised release or to discharge. At the time of such reexamination under this provision, the person who has been committed may retain or, if he or she is indigent and so requests, the court may appoint a qualified ***expert or a professional person*** to examine him or her. Notwithstanding this provision, the court that committed a person under Section G, above, may order a reexamination of the person ***at any time*** during the period in which the person is subject to the commitment order.

Any examiner conducting an examination under this provision must prepare a written report of the examination no later than 30 days after the date of the examination. The examiner must: (1) place a copy of the report in the person's medical records; and (2) provide a copy of the report to the court that committed the person under Section G, above.

J. PETITION FOR SUPERVISED RELEASE

1. When Petition May Be Filed

Act 479 specifies that any person who is committed for institutional care in a secure mental health facility or other facility under Section G, above, may petition the committing court to modify its order by authorizing supervised release if ***at least six months have elapsed*** since: (a) the initial commitment order was entered; (b) the most recent release petition was denied; or (c) the most recent order for supervised release was revoked. The ***director of the facility*** at which the person is placed may file such a petition for supervised release under this provision on the person's behalf ***at any time***.

2. Service of Petition on District Attorney or Department of Justice

If the person files a timely petition ***without counsel***, the court must serve a copy of the petition on the district attorney or DOJ, whichever is applicable, and refer the matter to the State Public Defender for an indigency determination and the possible appointment of counsel. If the person petitions ***through counsel***, his or her attorney must serve the district attorney or DOJ, whichever is applicable.

3. Appointment of Examiners by Court

Within 20 days after receipt of the petition, the court must appoint ***one or more examiners*** having the specialized knowledge determined by the court to be appropriate, who must examine the person and furnish a written report of the examination to the court ***within 30 days*** after appointment. The examiners must have reasonable access to the person for purposes of examination and to the person's past and present treatment records and patient health care records. If any such 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.

4. Court Hearing on Petition; Finding Relating to Dangerousness

The court, without a jury, must hear the petition ***within 30 days*** after the report of the court-appointed examiner is filed with the court, unless the petitioner ***waives*** this time limit. Expenses of the proceedings must be paid as provided in s. 51.20 (18), Stats. 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 substantially probable*** that the person will engage in acts of sexual violence if the person is not confined in a secure mental unit or facility.

In making this determination, the court ***may consider***, without limitation because of enumeration: (a) the nature and circumstances of the behavior that was alleged in the petition under Section C, 2, above; (b) the person's mental history and present mental condition; (c) where the person will live; (d) how the person will support himself or herself; and (e) what arrangements are available to ensure that the person has access to and will participate in necessary treatment.

If the court finds that the person is ***appropriate*** for supervised release, the court must notify the DHSS. The DHSS and the county department under s. 51.42, Stats., in the county of residence of the person must prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan must address the person's need, if any, for supervision, counseling, medication, community support services, residential services, vocational services and alcohol or other drug abuse treatment. The DHSS may contract with a county department [under s. 51.42 (3) (aw) 1. d., Stats.], with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan must:

a. Specify who will be responsible for providing the treatment and services identified in the plan.

b. Be presented to the court for its approval ***within 60 days*** after the court finding that the person is appropriate for supervised release, ***unless*** the DHSS, the county department and the person to be released request ***additional time*** to develop the plan.

If the county department of the person's county of residence declines to prepare a plan, the DHSS may arrange for another county to prepare the plan if that county agrees to prepare the plan and if the person will be living in that county. If DHSS is unable to arrange for another county to prepare a plan, the court must designate a county department to prepare the plan, order the county department to prepare the plan and place the person on supervised release in that county.

The provisions of Section G, 3, c, above, apply to an order for supervised release issued under this provision.

K. PETITION FOR DISCHARGE; PROCEDURE

1. Petition With Secretary's Approval

Under Act 479, if the Secretary of DHSS determines at any time that a person committed under new ch. 980 is ***no longer a sexually violent person***, the Secretary must authorize the person to petition the committing court for discharge. The person must file the petition with the court and serve a copy upon DOJ, the district attorney's office that filed the petition under Section C, above, whichever is applicable. The court, upon receipt of the petition for discharge, must order a hearing to be held ***within 45 days*** after the date of receipt of the petition.

At the hearing, the district attorney or DOJ, whichever filed the original petition, must represent the state and has the right to have the petitioner examined by an expert or professional person of its choice. ***The hearing must be before the court without a jury.*** The ***state*** has the burden of proving by ***clear and convincing evidence*** that ***the petitioner 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 or supervision of the DHSS. If the court is satisfied that the state ***has*** met its burden of proof, the court may proceed under Section G, above, to determine whether to modify the petitioner's existing commitment order.

2. Petition Without Secretary's Approval

A person may petition the ***committing court*** for discharge from custody or supervision without the Secretary's approval. At the time of an examination under Section I, above, the Secretary of DHSS must provide the committed person with a written notice of the person's right

to petition the court for discharge over the Secretary's objection. The notice shall contain a waiver of rights. The Secretary must forward the notice and waiver form to the court with the report of the DHSS's examination under Section I, above. 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. The committed person has a right to have an attorney represent him or her at the probable cause hearing, but the person is not entitled to be present at the probable cause hearing.

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. At the hearing, the committed person is entitled to be present and to the benefit of the protections afforded to the person under Section D, above. The district attorney or the DOJ, whichever filed the original petition, must represent the state at the hearing and ***the hearing must be to the court.*** The state has the right to have the committed person evaluated by experts chosen by the state. At the hearing, 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 person must be discharged from the custody or supervision of the DHSS. If the court is satisfied that the state ***has*** met its burden of proof, the court may proceed under Section G, above, to determine whether to modify the person's existing commitment order.

L. ADDITIONAL DISCHARGE PETITIONS

Act 479 specifies that, in addition to the procedures under Section K, above, a committed person may petition the committing court for discharge ***at any time.*** However, if a person ***has previously filed*** a petition for discharge ***without the DHSS Secretary's approval*** and the court determined, either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person was still a sexually violent person, then the court must ***deny*** any subsequent petition without a hearing unless the petition contains facts upon which a court could find that the condition of the person had so changed that a hearing was warranted. If the court finds that a hearing is warranted, the court must set a probable cause hearing in accordance with Section K, above, and continue proceedings under Section K, if appropriate. If the person ***has not previously filed*** a petition for discharge without the Secretary's approval, the court must set a probable cause hearing in accordance with Section K, above, and continue proceedings under that Section K, if appropriate.

M. NOTICE TO VICTIMS

1. Persons to Be Notified

Act 479 provides that if the court places a person on supervised release under Section G, above, or discharges a person under Section K or L, above, the district attorney or DOJ, whichever

is applicable, must notify whichever of the following persons is appropriate, if he or she can be found, in accordance with item 2, below:

a. The ***victim*** of the act of sexual violence. "Victim" is defined to mean a person against whom an act of sexual violence has been committed. "Act of sexual violence" is defined to mean an act or attempted act that is a basis for the allegation made in a petition under Section C, 2, above.

b. An ***adult member of the victim's family***, if the victim died as a result of the act of sexual violence. "Member of the family" is defined to mean a spouse, child, sibling, parent or legal guardian.

c. The victim's ***parent or legal guardian***, if the victim is ***younger than 18 years old.***

2. Contents of Notice; When Notice Sent

The notice must inform the person under item 1, above, of the name of the person who was committed under new ch. 980 and the date the person is placed on supervised release or discharged. The DHSS must send the notice, postmarked at ***least seven days before the date the person committed is placed on supervised release or discharged***, to the last-known address of the person under item 1, above.

3. Notification Cards for Persons with Right to Notice

The DHSS must design and prepare cards for persons specified in item 1, above, to send to the DHSS. The cards must have space for these persons to provide their names and addresses, the name of the person committed and any other information the DHSS determines is necessary. The DHSS must provide the cards, ***without charge*** to DOJ and district attorneys. The DOJ and district attorneys must provide the cards, ***without charge***, to persons specified in item 1, above. These persons may send completed cards to the DHSS. All DHSS records or portions of records that relate to mailing addresses of these persons ***are not subject to inspection or copying*** under the Open Records Law, except as needed to comply with a written request by a district attorney or DOJ for assistance in locating persons to be notified.

4. DOC Notice Requirement

The Act contains similar provisions for notification by DOC of the victim and any witness who testified against the prisoner in any court proceeding involving the offense before a prisoner who has been convicted of one of the crimes specified in the definition of "sexually violent offense" in Section A, above, is: (a) released from imprisonment because he or she has reached the expiration date of his or her sentence for the crime; or (b) released on leave under s. 303.068, Stats.

The Act also amends current DOC requirements for notice to certain victims of serious crimes upon placement of a prisoner in community residential confinement, in the Intensive Sanctions Program or on parole to: (a) include all of the crimes in the definition of "sexually violent offense" in new ch. 980 [i.e., adds ss. 948.06 and 948.07, Stats.], which are not currently included in those notice provisions; and (b) include notice to any witness who testified against the inmate in any court proceeding involving the offense.

N. PAYMENT OF COSTS FOR EVALUATION, TREATMENT AND CARE

Act 479 specifies that ***DHSS*** must pay for all costs relating to the evaluation, treatment and care of persons evaluated or committed under new ch. 980, created in the Act.

O. ACCESS TO RECORDS AND OTHER INFORMATION RELATING TO PERSONS SUBJECT TO CH. 980, STATS.

Act 479 sets forth exceptions to the confidentiality of juvenile court and DHSS records provisions in the Children's Code [ss. 48.396 (2) and 48.78 (2) (a), Stats., respectively]. The Act specifies that:

1. With reference to the current confidentiality of juvenile court records requirements, upon request of DHSS to review court records for the purpose of providing, under Section B, above, the DOJ or district attorney with a person's offense history, the court ***must*** open for inspection by authorized representatives of DHSS the records of the court relating to any child who has been adjudicated delinquent for a "sexually violent offense," as defined in new ch. 980.

2. The requirement of confidentiality of DHSS records under the Children's Code, does not prohibit DHSS from disclosing information about an individual adjudged delinquent for a sexually violent offense, as defined in new ch. 980, to: (a) the DOJ; (b) a district attorney or a judge acting under ch. 980; or (c) an attorney who represents a person subject to a petition under ch. 980. The court in which the petition under ch. 980 is filed may issue any protective orders that it determines are appropriate concerning information disclosed under this provision.

P. APPLICABILITY

Act 479 applies to a sexually violent person regardless of whether the person engaged in acts of sexual violence ***before, on or after*** the effective date of Act 479, June 2, 1994.

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