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May 13, 2013

Representative Joel Kleefisch
Chair, Assembly Committee on Criminal Justice
307 North. State Capitol
Madison, WI

Dear Chair Kleefisch and Members,

Thank you for having a hearing on Assembly Bill 28, which makes changes to the Chapter 980 civil commitment process for sexually violent persons. The State Public Defender (SPD) was pleased to be part of the committee that crafted AB 28, the Legislative Council Special Committee on Supervised Release and Discharge of Sexually Violent Persons.

The current supervised release and discharge system, while it has resulted in very few releases from commitment, has made it more likely that an individual would qualify for discharge than supervised release. While on supervised release, the individual is subject to very strict rules governing everything from treatment to living situation to work restrictions. No supervision, unless part of the original criminal sentence, or treatment is available after discharge. AB 28, in large part, expands the ability to achieve supervised release from civil commitment while tightening the ability to get discharge. The practical effect of this change is to ensure that, if an individual qualifies for supervised release, they have ongoing support and treatment post-commitment.

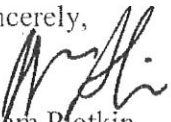
There were three specific concerns with the bill that the SPD raised during the committee process. First, Section 13 of the bill contains a requirement that the court accept, though not necessarily admit as evidence, any supplemental treatment reports filed by the Department of Health Services before a supervised release or discharge hearing. Second, Section 21 requires a petitioner to allege facts which "would likely" lead a fact-finder to determine that the petitioner no longer qualifies for commitment. A petition can be denied without a hearing if this pleading requirement is not met. Finally, Section 25 allows for a stay of execution of discharge for up to 10 working days to allow the Department of Health Services to prepare for the discharge.

Although these are areas of concern, the SPD believes that the changes contained in AB 28 offer benefit to our clients and their ongoing treatment while better protecting public safety.

The SPD appreciates the opportunity to have served on this committee and thanks Representative Pat Strachota for her leadership.

Thank you for your consideration of this legislation.

Sincerely,


Adam Plotkin
Legislative Liaison

Cc: Committee Members



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May 16, 2013

TO: Members, Assembly Criminal Justice Committee

FR: Attorney General J.B. Van Hollen

RE: 2013 Assembly Bill 28, relating to sexually violent persons

I write in support of 2013 Assembly Bill 28 in principle and in substance. Assembly Bill 28 addresses important, practical issues that have arisen in the existing process for civil commitment of "sexually violent persons" under Chapter 980 of the Wisconsin Statutes. If enacted, AB 28 would have the positive effect of assuring that more of the persons who must be released from ch. 980 commitments are released in a way that best protects public safety.

Assembly Bill 28 is the product of the work of the Joint Legislative Council and, specifically, the work of the Council's Special Committee on Supervised Release and Discharge of Sexually Violent Persons. I appreciate that the Department of Justice was given the opportunity to provide information and suggestions to the Special Committee and I thank the Committee Co-Chairs, Representative Strachota and Senator Darling, for the invitation to do so.

It is important to understand the current ch. 980 commitment process in order to fully appreciate the importance of Assembly Bill 28 to public safety. Chapter 980 of the Wisconsin Statutes permits the state to seek and obtain the civil, mental health commitment of a person previously convicted of certain types of sex crimes upon completion of the imprisonment ordered by the criminal court. In order to obtain a court order for that civil commitment, the state must first prove that the person (1) has a "mental disorder" predisposing him or her to commit acts of sexual violence and (2) that the person is dangerous as a result of that mental disorder. The level of dangerousness which must be proven is that the person is "more likely than not" to commit future acts of sexual violence. The state ordinarily relies on the testimony of forensic psychologists with expertise in the evaluation of sex offenders in order to prove both of those commitment criteria.

As in any civil mental health commitment process, persons committed under ch. 980 must be afforded the right to regular review of their commitment status and the right to seek release or discharge from the civil commitment order. The law also requires that a committed person be discharged from civil commitment orders if the state can no longer prove that the person meets the two criteria for commitment described above. If ch. 980 did not provide for the opportunity for judicial review of the commitment status and a meaningful opportunity for release from commitment, this entire civil commitment process would likely violate the state and federal Constitutions. Chapter 980 complies with these legal requirements by providing for annual

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reexaminations by state psychologists (section 980.07) and the opportunity to seek "supervised release" from the commitment or outright "discharge" from the commitment (sections 980.08 and 980.09, respectively).

"Supervised release" from commitment and "discharge" from commitment are quite different outcomes. A person granted supervised release from the commitment order remains subject to the commitment order but is placed in the community under very intense supervision by the Department of Health Services (DHS) and with a requirement for continued sex offender treatment. A person granted "discharge" from the commitment order is released to the community without any supervision by the court or DHS.

Assembly Bill 28 addresses concerns that the current ch. 980 supervised release and discharge statutes do not adequately protect the public. This is because the statutes have the practical effect of permitting (or requiring) complete discharge from commitment orders, in many cases without a period of transitional, supervised release placement first. Judges have raised this concern and the Department of Justice has experienced this reality in ch. 980 cases prosecuted by the Department. Two primary factors combine to make it much more likely that a committed person will qualify for outright discharge from the commitment before he or she ever meets the strict statutory criteria for supervised release.

First, in the past few years there have been developments in the field of psychology and sex offender risk assessment that result in forensic psychologist's more often determining that the committed person does not present the level of risk necessary to support and/or maintain the existing commitment order. When that risk threshold is no longer met, the court is required to discharge the person from the commitment order and permit his or her return to the community without any supervision. Prosecutors and courts are in no position to dictate to psychological professionals how they should reach their professional conclusions. But prosecutors are ordinarily dependent on the opinions of forensic psychologists in order to prove the elements for initial and continued commitment under ch. 980.

Second, the current statutory standards for supervised release, set out in sections 980.08(4)(cg) and 980.01(8), are very high, very rigid, and are very rarely satisfied, even by offenders who have been sincerely engaging in treatment for long periods of time. Those criteria were enacted as part of 2005 Act 434. Experience shows that, as a practical matter, the modifications to section 980.08 at that time substantially limited the availability of supervised release in ch. 980 cases as a transitional option for those committed persons progressing toward discharge from commitment. The Department of Health Services, prosecutors and the courts are often able to identify committed persons who, under the current methods of sex offender risk assessment, will be likely to qualify for discharge soon. But the inflexible supervised release criteria leave them with no ability to determine, through an intensive transitional supervised release placement, whether that person can actually be safely returned to the community.

The Special Committee concluded, and I agree, that in those situations where the law requires that a committed person be released to the community, it is in the interest of the community that the person's release occurs first through a structured, intensive supervised release program in as

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many cases as possible. In order to accomplish this goal, courts must be given some flexibility in determining the appropriateness of supervised release.

Let me be clear. The Wisconsin Department of Justice has vigorously prosecuted ch. 980 commitment actions and will continue to do so. I am certainly not advocating for the sex offenders committed under ch. 980, all of whom have committed very serious, violent crimes. There is certainly good reason to require committed persons to satisfy strict and high standards before being released to the community. However, it is critical to protect the public in the best way possible from sex offenders who must, under the law, sometimes be released from institutional care to the community. Assembly Bill 28 will have that effect by returning a reasonable balance to the statutory provisions governing supervised release and discharge. The bill does not make it "easier" for a committed person to meet the criteria for supervised release under section 980.08. The criteria remain essentially the same.

Assembly Bill 28 also provides for additional structure to the discharge statute, section 980.09, by more clearly defining the procedural requirements related to review of petitions for discharge and the court procedures thereafter. The content of the bill is consistent with recommendations offered by the Department of Justice. However, upon reviewing the final draft of the legislation, Department staff realized that the process could be made clearer in the AB 28 version of section 980.09. Attached to this document is a suggested amendment to 2013 Assembly Bill 28, making what we believe to be a minor, technical change to the bill as originally drafted. The purpose of the proposed amendment is to provide better guidance and clarity to courts and practitioners regarding the procedures to be followed under section 980.09. We believe this proposed change will improve the bill without straying from the intention of the Legislative Council's proposal.

I urge the Committee to incorporate the suggested amendment to 2013 Assembly Bill 28 and to approve the Bill. Thank you.

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Wisconsin Department of Justice - Proposed Amendment to 2013 Assembly Bill 28

The Department of Justice recommends that **Section 21** of 2013 Assembly Bill 28, (at pages 10 and 11, lines 17 and 1 – 9, respectively) be amended to delete all of lines 2 – 9 on page 11, beginning with the phrase “The court shall deny”

Section 21 of AB 28 currently sets out the provisions of section **980.09(1)** of the Wisconsin Statutes as amended by AB 28. Section 21, and proposed section 980.09(1) therein, continue the provision in current law that a committed person may petition for discharge from commitment at any time and modifies certain language in current section 980.09(1) providing for an initial court review of any discharge petition. In this way, Act 28 retains the same procedure as in current law but modifies and clarifies the standard for the initial review of the discharge petition.

Section 23 of 2013 Assembly Bill 28 (at pages 12 – 13, lines 3 – 19 and 1-10, respectively) amends sections 980.09(2) and (3) regarding the court’s obligation to review a petition filed under section 980.09(1) to determine if the petition is sufficient to require the court to hold a trial. Section 23 also sets out the procedure for that review of the petition as well as the standard of review to be applied during that review. The standard for reviewing the sufficiency of a petition for discharge in Sections 21 and 23 of AB 28 (proposed sections 980.09(1) and (2) of the statute) is essentially the same. The review is effectively redundant.

In addition, because certain procedural requirements and rights that are established by Sections 10, 12, 11, and 22¹ of AB 28 appear after proposed section 980.09(1) in the statutory structure, the order in which those provisions now appear in the bill may leave the erroneous impression that those obligations and rights do not apply if the petition is denied at the outset under proposed section 980.09(1). Removing the provision for review and denial of the petition from section 980.09(1) does not limit or eliminate any rights of the committed person or the state or impose any additional responsibilities of the court.

¹ **Section 10** of 2013 Assembly Bill 28 creates section **980.09(1m)(a)** (at page 6, lines 8 – 15) regarding the requirement that the court or opposing counsel serve any discharge petition on the attorney representing the state.

Section 12 of 2013 Assembly Bill 28 creates section **980.09(1m)(b)** (at page 7, lines 1 – 7) regarding the obligation of the court to refer a petition filed by a committed person without counsel to the Office of the State Public Defender for determination of indigency and appointment of counsel.

Section 11 of 2013 Assembly Bill 28 creates section **980.09(1m)(c)** (at page 6, lines 16 – 21) regarding the fact that the committed person and the state may use experts to support or oppose a petition filed under section 980.09(1).

Section 22 of 2013 Assembly Bill 28 creates section 980.09(1m)(d) regarding the obligation of the court to appoint an examiner for the committed person who has filed a petition under section 980.09(1).