IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEVEN J. BURGESS,

Petitioner,

v.

STEVE WATTERS, Director,
Sand Ridge Secure Treatment Facility,

Respondent.

REPORT AND
RECOMMENDATION

04-C-544-C

REPORT

Petitioner Steven Burgess is serving an indefinite term of confinement at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin, after having been found in August 2000 to be a sexually violent person pursuant to Wisconsin's sexually violent persons law, Chapter 980. Burgess has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his commitment. For the reasons stated below, I am recommending that this court deny Burgess's petition and dismiss this case.

Burgess is a member of a federally recognized Indian tribe and a legal resident of his tribe's federally recognized reservation land. He contends that his custody is unlawful under the Constitution or laws of the United States for two reasons: 1) in conducting involuntary civil commitment proceedings against him, the state violated Public Law 280, which prohibits Wisconsin from enforcing its civil regulatory laws against tribal reservation Indians;

and 2) the state violated his right to due process as outlined in *Kansas v. Crane*, 534 U.S. 407 (2002), when, to prove the likelihood of future recidivism, it relied upon actuarial instruments that did not consider petitioner's mental defect or status. Wisconsin's supreme court agreed to hear these claims and ultimately decided them against petitioner. First, it found that chapter 980 was either a prohibitive law or a civil adjudicatory law, the enforcement of which was not circumscribed by Pub. L. 280. Second, it found that because the state presented sufficient evidence at trial apart from the actuarial instruments from which the jury could find that Burgess was a sexually violent person, the use of the actuarial instruments did not violate petitioner's right to due process.

The only issue before this court is whether the state supreme court decided the claims in a manner that was either contrary to or involved an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). The claims raised by Burgess present difficult questions that reasonable jurists could answer differently. A review of the state supreme court's decision shows that it took petitioner's claims seriously, properly identified the controlling Supreme Court precedents and reached a conclusion that was reasonably supported by the analytical framework developed in those cases. As a result, Burgess is not entitled to federal habeas relief.

Pursuant to 28 U.S.C. § 2254(e), factual findings of a state court are presumed correct unless the Burgess rebuts the presumption with clear and convincing evidence. Burgess has not argued that the state courts made any erroneous factual determinations;

rather, he attacks the reasonableness of their legal conclusions. Accordingly, I have adopted the facts as set forth by the Wisconsin Supreme Court in *State v. Burgess*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W. 2d 124.

FACTS

This case involves the legality of an involuntary commitment under Wisconsin's sexually violent persons law, Wis. Stat. Chapter 980. By way of background, Chapter 980 requires an agency with authority to discharge or release a person who may fit the criteria for commitment as a sexually violent person to notify the Department of Justice or appropriate district attorney of pending release and to provide treatment records and other relevant documentation concerning that individual. Wis. Stat. § 980.015. A petition alleging that a person is a sexually violent person may be filed in the appropriate circuit court by the Department of Justice or the district attorney for either the county in which the person was convicted of a sexually violent offense or the county in which the person will reside upon his release. Wis. Stat. § 980.02(1).

A petition seeking commitment under chapter 980 must allege that the person: (1) was convicted, found delinquent, or found not guilty by reason of mental disease or defect of a sexually violent offense; 2) is within 90 days of release from a sentence, commitment, or secured correctional facility arising from a sexually violent offense; (3) has a mental disorder; and (4) is dangerous because that mental disorder creates a substantial probability

that he or she will engage in acts of sexual violence. Wis. Stat. § 980.02(2). Mental disorder is statutorily defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. § 980.01(2).

Upon the filing of a Chapter 980 petition, the circuit court must review the petition to determine whether there is probable cause to believe the person is a sexually violent person, in which the case the court will order the person to be transferred to an appropriate facility for a Chapter 980 evaluation. Wis. Stat. § 980.04. Within 45 days (or more, if good cause is shown) of the probable cause determination, a trial must be held to determine whether the person who is the subject of the petition is a sexually violent person. Wis. Stat. § 980.05(1). At the trial, the state has the burden of proving the allegations in the petition beyond a reasonable doubt. Wis. Stat. § 980.05(3). Chapter 980 guarantees the person who is the subject of the petition all constitutional rights available to a defendant in a criminal proceeding, including the rights to counsel, to remain silent, to present and cross-examine witnesses, to a jury trial, to retain experts and to have proceedings recorded by a court reporter. Wis. Stat. §§ 980.03(2), 980.05(1m).

If a court or jury determines that the person is a sexually violent person, the court must order the person committed to the custody of the Department of Health and Family Services for control, care and treatment until such time as the person no longer is a sexually violent person. Wis. Stat. § 980.06. The statute contains provisions requiring periodic

reexaminations and allowing for the committed person to petition for supervised release or discharge. Wis. Stat. §§ 980.07(1), 980.09(2), 980.08(1).

Burgess is an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians (Lac du Flambeau Tribe). On February 24, 1995, he was convicted of attempted second-degree sexual assault of a child in the Circuit Court for Vilas County. Burgess committed the sexual assault on the Lac du Flambeau Reservation, where he resided. Upon his conviction, Burgess was incarcerated at the Oshkosh Correctional Institution. Burgess was scheduled for release on November 17, 1998. That same day, the state filed a petition pursuant to Chapter 980, seeking to commit Burgess as a sexually violent person.

On November 19, 1998, a probable cause hearing was held by the circuit court. Based on the testimony presented at the hearing, the circuit court found probable cause that Burgess is a "sexually violent person" within the meaning of Wis. Stat. § 980.01(7), and Burgess was transferred to the Mendota Mental Health Institute. Burgess requested a jury trial for the Chapter 980 proceedings.

Burgess filed a pre-trial motion to dismiss the petition on the grounds that the circuit court lacked jurisdiction because he is an enrolled tribal member and committed the sexually violent offense on the Lac du Flambeau Reservation. In response, the circuit court contacted the Lac du Flambeau tribal court, which declined jurisdiction because the Lac du Flambeau Tribe had not yet passed an ordinance to address the commitment of sexually violent

persons, such as Burgess. Thus, the trial court stated that it "accept[ed] the letter from the tribe that is indicating that they are not in a position . . . to hear this case at this time."

In August 2000, a jury trial was held to determine whether Burgess is a sexually violent person. The state presented the testimony of two psychologists, Linda Nauth and Sheila Fields. Dr. Nauth, a staff psychologist at Fox Lake Correctional Institution, conducted Burgess's "end of confinement" evaluation to determine if the state should pursue a Wis. Stat. ch. 980 commitment. Dr. Nauth utilized and reviewed various sources of information about Burgess, including his social services file, his clinical services file, his sex offender program reports, and data from actuarial instruments (e.g. Rapid Risk Assessment for Sex Offender Recidivism or RRASOR). She also consulted with other professionals involved with Burgess's care and treatment and conducted a two-hour clinical interview with Burgess. From this information, Dr. Nauth concluded:

> This clinician came to the opinion to a reasonable degree of psychological certainty that Mr. Burgess suffers from pedophilia which is an acquired or congenital condition affecting his emotional or volitional capacity which predisposes him to commit sexually violent acts as defined by Chapter 980. In addition, his diagnosis of alcohol dependence and anti-social personality disorder are acquired or congenital conditions which combined with pedophilia also affects his emotional or volitional capacity which predisposes him to commit sexually violent acts as defined by Chapter 980.
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> It is also my opinion that each of these mental disorders, separately and together as exhibited by Mr. Burgess, create a substantial probability that he will engage of acts of sexual violence. Finally, the preponderance of risk factors which apply

> to Mr. Burgess, are indicative that he is at a substantial risk to commit another sexual offense.

At trial, Dr. Nauth testified that Burgess's pedophilia predisposed him to engage in acts of sexual violence and his alcohol dependence lowered his inhibitions and made it more difficult to control his pedophilic impulses. In addition, she explained that Burgess's antisocial personality disorder further aggravated his pedophilia. To help her evaluate Burgess's risk of reoffense, she completed an actuarial test, the Rapid Risk Assessment of Sex Offender Recidivism (risk assessment). Dr. Nauth said Burgess's score showed he had an eighty percent chance of reconviction within ten years. She concluded that Burgess's disorders, along with his score on the risk assessment, indicated a substantial probability that Burgess would engage in acts of sexual violence.

The state's other psychologist, Dr. Fields, considered several sources of information in conducting her evaluation of Burgess, including files on Burgess from the Department of Corrections and the Mendota Mental Health Institute, data from actuarial instruments, discussions with other professionals involved with Burgess's care and treatment, and a three-hour interview with Burgess. Based on her evaluation, Dr. Fields concluded:

> It is my professional opinion, to a reasonable degree of scientific certainty, that Mr. Burgess manifests six diagnosed disorders: Pedophilia, Alcohol Abuse, Cocaine Abuse, Cannabis Abuse, Amphetamine Abuse, and Antisocial Personality Disorder. The diagnoses of Pedophilia and Antisocial Personality Disorder constitute mental disorders as defined by Chapter 980, and are acquired or congenital conditions affecting Mr. Burgess' emotional or volitional capacity predisposing him to commit sexually violent acts, as defined by Chapter 980.

....

> It is my professional opinion, then, to a reasonable degree of scientific certainty, that Mr. Burgess' mental disorders create a substantial probability that he will commit a sexually violent act as defined by Chapter 980, and that he is therefore a proper subject for commitment as a sexually violent individual.

Dr. Fields testified that Burgess's antisocial personality disorder and pedophilia made it substantially probable he would commit a sexually violent act. Specifically, she testified Burgess's score on the risk assessment suggested a seventy-three percent chance of reconviction within ten years. She also said the revised Minnesota Sex Offender Screening Tool showed Burgess had a very high risk of reoffense. In addition, she determined Burgess scored in the sixty-seventh percentile on the Hare Psychopathy Checklist. Dr. Fields explained the Hare test was not an actuarial instrument, but rather measured a person's level of psychopathy. Burgess's score, according to Dr. Fields, was very high. Dr. Fields testified that Burgess's pedophilia and psychopathy suggested a higher risk of recidivism, and that Burgess seems to have "a very difficult problem with impulse control . . .".

On his cross-examination of Dr. Fields, Burgess's attorney attacked the reliability of the actuarial tests and their predictive ability. Dr. Fields admitted that simply because a person has pedophilia does not mean he or she is unable to control his or her behavior. In response to questions about Burgess's mental culpability, Dr. Fields said she believed Burgess knew the difference between right and wrong and was able to conform his conduct to the requirements of the law.

Burgess presented the testimony of psychologist Charles Lodl, and therapist Lloyd Sinclair. Dr. Lodl testified that Burgess had several mental disorders that predisposed him to acts of sexual violence, including pedophilia and antisocial personality disorder. However, Dr. Lodl determined Burgess had only a moderate risk level of committing future sexually violent acts, and did not meet Wis. Stat. ch. 980's "substantial probability" requirement. Dr. Lodl based this decision on his use of the Static-99 actuarial test, which he said more accurately reflected Burgess's reoffense risk than some of the tests that Drs. Fields and Nauth performed. Sinclair is a private therapist specializing in sex offender treatment who works as a consultant to the Department of Corrections. His testimony mostly recounted Burgess's treatment history while in prison. He concluded that Burgess presented a moderate reoffense risk.

The jury found Burgess a sexually violent person and the trial court ordered commitment. Burgess filed post-judgment motions for a new trial or relief from judgment, or alternatively, for a dispositional hearing for immediate supervised release or a right to petition for release after six months. The circuit court denied the motions, and Burgess appealed.

Burgess raised several issues at the court of appeals, including: (1) whether the circuit court had jurisdiction to conduct the commitment proceedings because Burgess was an enrolled member of the Lac du Flambeau Tribe and committed the underlying criminal offense on the Lac du Flambeau Reservation; and (2) whether his commitment violated due

process because there was insufficient evidence to support the jury's finding that he was a sexually violent person. The court of appeals affirmed the judgment and order of the circuit court, concluding that Wisconsin has jurisdiction over Chapter 980 proceedings involving tribal members who commit sexually violent offenses on Indian reservations by virtue of § 4 of Pub. L. 280, codified at 28 U.S.C. § 1360. *In re Commitment of Burgess*, 2002 WI App at ¶ 19, 258 Wis. 2d at 563, 654 N.W. 2d at 89. The court of appeals also concluded that there was sufficient evidence for the jury to find that Burgess is a sexually violent person. *Id*. at ¶¶ 24-27, 258 Wis. 2d at 566-67, 654 N.W. 2d at 90-91.

The Wisconsin Supreme Court granted Burgess's petition for review. On June 27, 2003, the court issued a unanimous decision in which it affirmed the court of appeals. In deciding Burgess's claim that the circuit court lacked jurisdiction to commit him as sexually violent person, the court looked to the analytical framework developed by the United States Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208-09 (1987), and *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976), for deciding whether a particular matter falls within the jurisdiction granted to the states by Congress in Pub. L. 280. *In re Commitment of Burgess*, 2003 WI 71, ¶¶ 12-15, 262 Wis. 2d 354, 365-369, 665 N.W. 2d 124, 129-131. After examining the nature and intent of Chapter 980, the court determined that it was a "criminal/prohibitory" law and therefore fell within the grant of criminal jurisdiction conferred to states by § 2 of Pub. L. 280. *Id*. at ¶¶ 16-19, 262 Wis. 2d at 369-371, 665 N.W. 2d at 132. Alternatively, held the court, if Chapter 980 was

construed strictly as a "civil" law, the state could still enforce it under Pub. L. 280's grant of civil jurisdiction because it involved an adjudicatory matter (the dispute about Burgess's mental health) as opposed to a regulatory matter. *Id*. at ¶¶ 20-21, 262 Wis. 2d at 371-72, 665 N.W. 2d at 132-33.

The court then turned to Burgess's claim that the evidence presented by the state was insufficient to prove a substantial probability that he would reoffend due to his mental disorders, as required by *State v. Laxton*, 2002 WI 82, ¶ 22, 254 Wis. 2d 185, 647 N.W. 2d 784. Burgess argued that the state's experts relied on actuarial instruments as a basis for their opinion about his likelihood of re-offending. According to Burgess, these actuarial instruments were irrelevant because they assessed his risk of re-offending as a matter independent from his mental disorder. Therefore, argued Burgess, the opinions of the state's experts failed to establish that he had a substantial probability of re-offending *because of* his mental disorders, a nexus required to establish that he was a sexually violent person under Chapter 980 and to satisfy due process concerns.

The supreme court rejected Burgess's argument, agreeing with the state that there was sufficient evidence from which the jury could find that Burgess was a sexually violent person, even without considering the actuarial data. *Id*. at ¶¶ 25-30, 262 Wis. 2d at 374-376, 665 N.W. 2d at 134-35. The court noted that the actuarial data were only one source among many that the experts had consulted in reaching their conclusion that Burgess was likely to re-offend. *Id*.

Analysis

I. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to the conclusions reached by the Wisconsin Supreme Court. Specifically, this court may not grant Burgess's application for a writ of habeas corpus unless the state court's adjudication of his claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The "contrary to" clause of § 2254(d)(1) pertains to pure questions of law. *Lindh v. Murphy*, 96 F.3d 856, 868-69 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). When the case falls under § 2254(d)(1)'s "contrary to" clause, the district court reviews the state court decision de novo to determine the legal question of what is clearly established law as determined by the Supreme Court and whether the state court

decision is "contrary to" that precedent. *Denny v. Gudmanson*, 252 F.3d 896, 900 (7th Cir. 2001) (citations omitted).

The "unreasonable application" clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh*, 96 F.3d at 870. A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411. The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

II. Jurisdiction Under Pub. L. 280

A. Controlling Supreme Court Precedent

In 1953, Congress enacted Public Law 280, which expressly granted six states, including Wisconsin, jurisdiction over specified areas of Indian country within the states. The central focus of the law was to provide for state criminal jurisdiction over offenses

committed by or against Indians on the reservations. *Bryan v. Itasca County*,426 U.S. 373, 380 (1976). This criminal jurisdiction was conferred by § 2 of the law, which provides:

> **(a)** Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
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> . . .
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> Wisconsin ..... All Indian country within the State.

Public Law 280, § 2, codified at 18 U.S.C. § 1162.

Public Law 280 also provides a grant of civil jurisdiction to the states. Section 4 of the law provides:

> **(a)** Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
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> . . .
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> Wisconsin .....All Indian country within the State.

Public Law 280, § 4, codified at 28 U.S.C. § 1360(a).

In *Bryan*, the Court relied upon legislative history and principles of statutory construction to conclude that Section 4 was intended primarily "to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes." 426 U.S. at 373. The Court rejected the county's contention that § 4 conferred upon the states general civil state regulatory authority, including taxing power, over reservation Indians. *Id*. at 382-387.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1986), the Court described the test for determining when a state has the authority under Pub. L. 280 to enforce a law on a reservation:

> [W]hen a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

In *Cabazon*, the Court considered whether California had the authority under Pub. L. 280 to enforce a state bingo statute on an Indian reservation. The statute permitted bingo games to be conducted only by charitable and other specified organizations, and then only by their members who could not receive any wage or profit for doing so. The statute also limited prizes and required receipts to be segregated and used only for charitable purposes. Violation of any of the statutory provisions was a misdemeanor.

In deciding whether the statute fell within Pub. L. 280's grant of criminal jurisdiction, the Court adopted the test devised by the Ninth Circuit Court of Appeals in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (1982). The Court agreed with the Ninth Circuit that Pub. L. 280's application depended upon whether the state statute at issue was a "criminal/prohibitory" law or a "civil/regulatory" law. The Court explained:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209. However, the Court recognized that some state statutes are "not so easily categorized" and that "[i]t is not a bright-line rule . . .". *Id*. at 208, 210.

Reviewing the bingo statute at issue, the Court agreed with the court of appeals that the "nature and intent" of the statute was regulatory rather than prohibitory. *Id*. at 210. It noted that California did not prohibit all forms of gambling, but allowed a state-run lottery, parimutuel horse-race betting and card games. Bingo was legally sponsored by many different organizations and was played widely in California, the state making no effort to forbid the playing of bingo by any member of the public over the age of 18. Moreover, the state did not limit the number of games that eligible organizations could operate or the receipts that they could obtain therefrom. These features of the state's gambling law

indicated that California regulated rather than prohibited gambling in general and bingo in particular. *Id*. at 210-211. The Court rejected California's contention that high stakes, unregulated bingo was a misdemeanor in California and could therefore be prohibited on Indian reservations. The Court explained:

> [T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

Id. at 211.

B. The Wisconsin Supreme Court's Decision in *Burgess*

In deciding whether the state had jurisdiction under Pub. L. 280 to conduct involuntary commitment proceedings against Burgess under Wis. Stat. Chapter 980, the Wisconsin Supreme Court looked to the analytical framework developed in *Bryan* and *Cabazon*. The court began by considering whether the state had jurisdiction under Pub. L. 280's grant of criminal jurisdiction, examining the "nature and intent" of Chapter 980 and "whether the conduct at issue violated the State's public policy." *In re Commitment of Burgess*, 2003 WI at ¶¶ 12-16, 262 Wis. 2d at 365-369, 665 N.W. 2d at 129-131. The court noted that it had held that the involuntary commitment of an individual under Chapter 980 was a "civil" commitment as opposed to a criminal one because the purposes of the Chapter were to protect the public and to provide treatment. *Id*. at ¶ 17, 262 Wis. 2d at 370, 665 N.W.

2d at 132 (citing *State v. Carpenter*, 197 Wis. 2d 252, 267, 541 N.W. 2d 105 (1995)). Nonetheless, the court concluded that Chapter 980 fell into the "criminal/prohibitory" category and thus the circuit court had jurisdiction to conduct Chapter 980 proceedings for the civil commitment of Burgess. The court reasoned:

> [N]otwithstanding the "civil" commitment allowed under Chapter 980, only individuals who have been convicted of certain crimes–"sexually violent offenses," may be committed pursuant to Chapter 980. In addition, the primary purpose of Chapter 980 is to protect the public from future acts of sexual violence.
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> Chapter 980 permits the involuntary commitment of "only the most dangerous of sexual offenders–those whose mental condition predisposes them to reoffend." *Post*, 197 Wis. 2d at 307. The "principal purposes of ch. 980 are the protection of the public and the treatment of convicted sex offenders who are at a high risk to reoffend in order to reduce the likelihood that they will engage in such conduct in the future." *Carpenter*, 197 Wis. 2d at 271.
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> The conduct addressed by Chapter 980 commitments, both past as well as potential future conduct, is contrary to Wisconsin's public policy. The commission of sexually violent offenses is not permitted conduct that is regulated by the State; rather, it is prohibited conduct that is "inimical to the health and safety of its citizens . . .". *State ex rel. Lykins v. Steinhorst*, 197 Wis. 2d 975, 887, 541 N.W. 2d 2345 (1995). The "civil" proceedings under Chapter 980 are enveloped on both sides by criminal conduct: (1) only persons who have committed sexually violent offenses are eligible for commitment under Chapter 980 and (2) Chapter 980 commitments are intended to protect the public by preventing future acts of sexual violence. Thus, the conduct at the heart of Chapter 980–both past and potential future conduct–is prohibited and not merely regulated by the State. Therefore, we conclude that the circuit court had jurisdiction to

> conduct Chapter 980 proceedings for the civil commitment of Burgess pursuant to PL-280.

Id. at ¶¶ 17-19, 262 Wis. 2d at 370-371, 665 N.W. 2d at 132.

The court found that even if Chapter 980 was strictly construed as a "civil" law in its entirety, it was nonetheless "civil/adjudicatory" rather than "civil/regulatory," and therefore fell within Pub. L. 280's grant of civil jurisdiction to the state. Relying on *Bryan*, the court found that the adjudication of Burgess's mental health was a status determination, much like those involving insanity, as opposed to a regulation such as the power to tax. *Id*. at ¶¶ 20-21, 262 Wis. 2d at 371-372, 665 N.W. 2d at 132-133. The court noted that the *Bryan* court had cited favorably to a law review article which contended that Congress intended Pub. L. 280's grant of civil jurisdiction to extend to laws that had to do with "private rights and status," such as "contract, tort, marriage, divorce, insanity, descent, etc.". *Id*. at ¶ 20, 262 Wis. 2d at 371, 665 N.W. 2d at 132 (citing *Bryan*, 426 U.S. at 384. n. 10, in turn quoting Israel & Smithson, "Indian Taxation, Tribal Sovereignty and Economic Development," 49 N.D.L. Rev. 267, 296 (1973)). In addition, noted the court, the tribal court in Burgess's case had declined to accept jurisdiction because the Lac du Flambeau Tribe had not yet passed an ordinance regarding the commitment of sexually violent persons. The court found that this "bolstered" the appropriateness of state jurisdiction "since one of the stated purposes of PL-280 was to 'redress the lack of adequate Indian forums . . .'". *Id*. at ¶ 21, 262 Wis. 2d at 372, 665 N.W. 2d at 133 (quoting *Bryan*, 426 U.S. at 383).

C. Application of 28 U.S.C. § 2254(d)

Burgess contends that in concluding that the state had jurisdiction to commit Burgess under Pub. L. 280, the Wisconsin Supreme Court unreasonably applied the Supreme Court's decisions in *Bryan* and *Cabazon*.[1] Burgess argues that the court's conclusion that Chapter 980 was "criminal/prohibitory" as opposed to "civil/regulatory" is contrary to its decision in *Carpenter* in which it held that Chapter 980 is civil, nonpunitive and not criminal for the purposes of double jeopardy and ex post facto analysis. He also points out that the United States Supreme Court has made the same finding with respect to similar sexual predator laws in other states. *Kansas v. Hendricks*, 521 U.S. 346 (1997) (proceedings under Kansas Sexually Violent Predator Act not "criminal" and therefore petitioner was not subject to punishment for purposes of double jeopardy and ex post facto clauses); *Allen v. Illinois*, 478 U.S. 364 (1986) (proceedings under Illinois Sexually Dangerous Persons Act not "criminal" within the meaning of Fifth Amendment's guarantee against compulsory self-incrimination).

Burgess focuses heavily on language in *Carpenter* wherein the court found that Chapter 980 did not violate the ex post facto clause because its restriction on convicted sex offenders

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[1] At pages 2-9 of his opening brief, Burgess attacks the Wisconsin Supreme Court's decisions in *State v. Webster*, 114 Wis. 2d 418, 338 N.W. 2d 474 (1983) and *County of Vilas v. Chapman*, 122 Wis. 2d 212, 361 N.W. 2d 699 (1985), arguing that the court in those cases adopted a test for determining whether the state may exercise authority over reservation Indians that is contrary to the Supreme Court's decisions in *Bryan* and *Cabazon*. However, there is nothing in the state supreme court's decision in Burgess's case that suggests that it relied on *Webster* or *Chapman*'s analysis in reaching its conclusion that the state had the authority to commit Burgess under Chapter 980. The fact that the state trial court might have relied on *Webster* and *Chapman* is irrelevant. The correctness of the decisions of the trial court and of the Wisconsin Supreme Court in other cases is not an issue in this case.

was not punishment for past activity, but "comes about incident to a regulation of a present situation," namely, the offender's current condition and present danger to the public. *Carpenter*, 197 Wis. 2d at 274, 541 N.W. 2d at 114. Burgess argues that the supreme court's characterization of Chapter 980 as a civil, non-punitive, regulatory statute in *Carpenter* and other cases dictates the conclusion that the statute is civil/regulatory for the purpose of determining whether it falls within the scope of state jurisdiction granted by Pub. L. 280.

Burgess's argument has merit. Although it is true, as the state argues, that a finding that a statute is "civil" or "criminal" in the constitutional context does not necessarily make it so in the context of Pub. L. 280, nonetheless the state supreme court's interpretation of the statute's intent in *Carpenter* is relevant to the Pub. L. 280 analysis. Although the presence or absence of a criminal penalty is not dispositive in deciding whether a state statute is regulatory or prohibitory, *see St. Germaine v. Circuit Court for Vilas County*, 938 F.2d 75, 77 (7th Cir. 1991), the finding by the Wisconsin Supreme Court in other cases that the legislature acted without punitive intent undermines the argument that the statute is "prohibitory." As Burgess points out, Chapter 980 is not like a law prohibiting the operation of a motor vehicle without a license or the possession of fireworks, activities that the state legitimately may prohibit. Chapter 980 does not make unlawful any particular conduct; rather, it seeks to *prevent* a class of people from engaging in *future* dangerous conduct by detaining and treating them. One might even say the statute is regulatory in that it

establishes conditions that a person adjudicated to be a sexually violent person must meet in order to gain release, namely, that the individual no longer has a predisposing mental condition or no longer is substantially likely to commit future acts of sexual violence.

Nonetheless, the existence of support for the position that Chapter 980 is a regulatory statute is insufficient to establish that the state supreme court's decision to the contrary was unreasonable under § 2254(d)(1). Recognizing that Chapter 980 did not fall neatly under either the criminal/prohibitory or civil/regulatory category, the Wisconsin Supreme Court focused on *Cabazon*'s broad, "shorthand test" and considered "whether the conduct at issue violates the State's public policy." The court found that the conduct addressed by Chapter 980 commitments was the commission of sexually violent offenses, which was "inimical to the health and safety" of Wisconsin's citizens and contrary to the state's public policy.

At least one commentator has criticized courts for using *Cabazon*'s "public policy" test, arguing that the test is so broad that it allows a court to "disguise" its "decision to base a case's outcome on the criminal or regulatory importance of the law to the state and not on the actual criminal or regulatory nature of the specific regulation." Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 U.C.L.A. L. Rev. 1333, 1358 (1999). There is merit to the view that "[t]o some extent any statute, whether criminal or regulatory, reflects the public policy of the state to assert jurisdiction over a certain type of conduct." *Id*. at 1364. Yet in spite of the practical problems associated with the public policy test, the United States Supreme Court has not

decided any cases since *Cabazon* in which it has qualified its endorsement of the test as a shorthand method of attempting to discern whether a state statute is prohibitory or regulatory. Therefore, the Wisconsin Supreme Court could not have violated clearly established federal law by employing the test.

Further, the court reasonably applied *Cabazon* when it determined that the conduct "at the heart of" Chapter 980 was contrary to state public policy. Burgess views the statute too narrowly when he argues that the "conduct at issue" in Chapter 980 is mental illness, *simpliciter*. Chapter 980 applies only to those individuals who have committed sexually violent offenses in the past and who are shown to have a present mental condition that makes them prone to commit sexually violent offenses in the future. Chapter 980's purpose is to protect the public by preventing future acts of sexual violence, not to prevent mental illness. As the state supreme court found, acts of sexual violence are prohibited, not regulated, by the state. Accordingly, the court reasonably concluded that the state had jurisdiction over Burgess under Chapter 980 pursuant to Pub. L. 280's grant of criminal jurisdiction.

It also was reasonable for the state supreme court to conclude that the state could bring Chapter 980 proceedings against Burgess even if the statute was strictly construed as a "civil" law because Chapter 980 is "adjudicatory"and therefore falls within the scope of Pub. L. 280's grant of civil jurisdiction under § 4. Burgess insists that Pub. L. 280's grant of civil jurisdiction applies only to private legal disputes to which the state is not a party. He

argues that an involuntary civil commitment "represent[s] a very powerful use of the state's sovereign regulatory police powers over an individual," not a legal dispute between reservation Indians or between Indians and other private citizens.

Again, there is support for Burgess's position. In divining the scope of § 4 from the statute's legislative history, the Supreme Court concluded in *Bryan* that

> subsection (a) [of § 4] seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action."

Bryan, 426 U.S. at 383. Burgess points out that the Wisconsin Attorney General also has opined that the civil jurisdiction grant of Pub. L. 280 applies only to disputes between private persons. *See* 70 Wis. Op. Atty. Gen 237, *3 (1981)) (if child custody matter involved only private persons, as in voluntary foster care placement, state law could be applied under Pub. L. 280's jurisdictional grant, but it could not be applied to "those proceedings that involve some aspect of the state's regulatory jurisdiction such as involuntary termination of parental rights").[2]

[2] Burgess also relies upon attorney general opinions from Wisconsin and other states which conclude that applying involuntary commitment procedures to a reservation Indian would be an unauthorized intrusion into tribal sovereignty. *See* Pet. Br. in Supp. of Pet., dkt. #10, at 11-13. However, he concedes that none of these cases arose in the context of Pub. L. 280.

All this being true, the Supreme Court was not asked in *Bryan* to decide whether the term "civil laws of general application" included civil disputes to which the state is a party. Therefore, *Bryan* does not provide compelling authority for the proposition that the term does *not* cover such disputes. In deciding that the civil grant of jurisdiction under Pub. L. 280 was broad enough to cover "status determinations" such as whether an individual is a sexually violent person under Chapter 980, the Wisconsin Supreme Court took its cue from a footnote in *Bryan* in which the Court cited favorably to the suggestion that:

> Congress intended 'civil laws' to mean those laws which have to do with private rights and status. Therefore, 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws.

Bryan, 426 U.S. at 384 n. 10 (quoting Israel & Smithson, *cited supra*, 49 N.D. L. Rev. At, 296). By including "insanity" among the private laws that Congress intended to include within Pub. L. 280's grant of civil jurisdiction, the authors of the article cited by the Court appear to have rejected the notion that "civil laws of general application to private persons or private property" could never include an action in which the state was an interested party.

In concluding that Pub. L. 280's grant of civil jurisdiction included Chapter 980 adjudications, the state supreme court observed that a Chapter 980 adjudication is a status determination much like those involving insanity, as opposed to a regulatory statute such as one involving taxation. The court found further support for its position in the absence

of an adequate Indian forum to address the commitment of sexually violent persons. In light of *Bryan*'s implicit endorsement of the notion that status determinations fall within Pub. L. 280's grant of civil "adjudicatory" jurisdiction and the absence of any clear statutory language to the contrary, I conclude that the Wisconsin Supreme Court reasonably applied Pub. L. 280 and *Bryan* when it concluded that the state could bring Chapter 980 proceedings against Burgess pursuant to Pub. L. 280's grant of civil jurisdiction.

Finally, the Supreme Court indicated in *Cabazon* that the prohibitory-regulatory distinction is not a bright-line rule that always allows for easy categorizations, an assessment with which other courts and commentators have agreed. *Cabazon*, 480 U.S. at 210; *see also Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F. Supp. 712, 719 (W.D. Wis. 1981) (indicating that prohibitory-regulatory approach was "mechanical" and "not wholly satisfactory" alone to decide whether state had power to enforce bingo laws on reservation); Foerster, cited *supra*, 46 U.C.L.A. L. Rev. at 1344 (noting that *Cabazon's* vague principles have "caused considerable conflict and inconsistency in judicial decisions and rationales"). The test's flexible nature and the acknowledged difficulty in applying it contributes to my conclusion that the state supreme court's decision was not unreasonable. As the Supreme Court explained in *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (2004):

> The term "unreasonable" [as used in § 2254(d)(1)] is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect.

> Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

541 U.S. at ___, 124 S.Ct. at 2149.

In sum, even if the Wisconsin Supreme Court were *incorrect* to conclude that Chapter 980 falls within the scope of Pub. L. 280's jurisdictional grant, this conclusion is not an *unreasonable* application of clearly established Federal law as determined by the Supreme Court of the United States. Therefore, Burgess is not entitled to habeas relief on his first claim.

III. Use of Actuarial Instruments

Burgess contends that the state violated his right to due process by relying on actuarial instruments to prove that he was substantially likely to engage in sexually violent acts. Actuarial instruments are psychological instruments developed by individuals working in the field of sex offender risk assessment to aid in making predictions of future dangerousness. Researchers study sex offenders who recidivate to determine which risk factors they have in common, then use the factors that repeat most often to create the actuarial instruments. Actuarial instruments mainly measure static factors, such as an individual's age and offense history. At the time of Burgess's jury trial, 15 states had sexually

violent predator laws and only two, Texas and Massachusetts, did not use actuarial tools. *See In re Commitment of R.S.*, 339 N.J. Super. 507, 522, 773 A.2d 72, 80 (N.J. Super. A.D. 2001).

In *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997), the Supreme Court held that the statutory criterion for confinement embodied in the Kansas Sexually Violent Predator Act satisfied substantive due process requirements because the statute required a finding of dangerousness to one's self or others and "link[ed] that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." Re-reviewing the statute five years later, the Court re-emphasized the importance of the requirement that the state prove that the sexual offender has "serious difficulty in controlling behavior," explaining that such a requirement was necessary to "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (citing *Hendricks*, 521 U.S. at 357-358). In *State v. Laxton*, 2002 WI 82, ¶ 22, 254 Wis. 2d 185, 647 N.W. 2d 784, the Wisconsin Supreme Court found that Chapter 980 satisfied *Crane*'s due process requirement because it required the state to prove a nexus between the individual's mental disorder and his dangerousness.

Burgess argues that because the actuarial instruments relied on by the state's experts did not consider his mental health, they merely showed his probability of reoffending, not

that he would reoffend *because* of his mental disorder. In other words, says Burgess, the state's experts established only that Burgess has a mental condition that predisposes him to commit sexually violent acts and that he has a substantial likelihood of reoffending. Burgess argues that this evidence fails to prove that his mental disorders–rather than general recidivism–were the *cause* of the substantial probability of reoffending.

The state supreme court did not address Burgess's objections to the relevance of the actuarial instruments, finding instead that there was ample evidence in the record apart from the testimony concerning Burgess's scoring on the actuarial instruments from which the jury could find that Burgess was a sexually violent person. The court found that both the opinions of Drs. Nauth and Fields that Burgess was substantially likely to reoffend as a result of his mental disorder were not based solely on the actuarial instruments but upon in-depth and multi-faceted evaluations that considered various sources of information.

Burgess does not dispute that Drs. Nauth and Fields considered various pieces of information in arriving at their conclusions. However, he appears to contend that to establish that he is a sexually violent person, the state's experts would have to have testified that their opinion concerning his risk of reoffending would have been the same even if they had applied only their clinical judgment to Burgess's psychological diagnosis without relying on the actuarial instruments. Burgess maintains that the record contains no such testimony, and argues that the state's experts used the actuarial instruments as the basis for their predictions. Burgess also points out that Drs. Fields and Lodl acknowledged that a diagnosis

of pedophilia did not, by itself, establish that a person could not control his behavior, and they testified that Burgess was able to conform his conduct to the requirements of the law.

But as the state supreme court noted, the issue is whether there was sufficient evidence from which the jury could find that Burgess is dangerous because he suffers from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence. Although the state supreme court may have underestimated the significance of the actuarial instruments to Dr. Fields's–and to a lesser extent Dr. Nauth's–opinions concerning future dangerousness, it was not unreasonable for the court to conclude that other evidence in the record established a nexus between Burgess's mental disorder and the likelihood that he would reoffend.[3]

First, in addition to her testimony concerning how Burgess scored on the RRASOR actuarial instrument, Dr. Nauth testified that Burgess suffered from the mental disorders of pedophilia, alcohol dependence, cannabis abuse and antisocial personality disorder. She testified that pedophilia affected Burgess's emotional or volitional capacity and predisposed Burgess to engage in acts of sexual violence. She also testified that Burgess's alcohol abuse was evidence that Burgess had difficulty controlling his behavior in other areas and that it lowered the inhibitions for him to act on his pedophilic impulses. In addition, she testified

[3] Even if Burgess were correct in asserting that state's proof of future dangerousness fails without the actuarial instruments, I would not necessarily agree that the risk predictions made by the instruments bear no relation to the subject's mental health. It is not necessary to decide this question because the state supreme court correctly concluded that there was enough evidence to support Burgess's commitment even without the actuarial instruments.

that Burgess's anti-social personality disorder was evidence of a disregard of the rights of others and a "pattern of not thinking about other people or not living or looking beyond the impulse that he has," a pattern that also would diminish his ability to control his pedophilic urges. Dr. Nauth indicated that Burgess had not completed any treatment that ameliorated his risk of reoffending. Finally, Nauth's report indicated that her opinion that Burgess was substantially likely to reoffend was based on features of Burgess's mental disorders, with the actuarial instruments providing additional support for her opinion.

Dr. Fields agreed with Dr. Nauth that Burgess's alcohol use and his antisocial personality disorder indicated generally that Burgess was unable to control his behavior overall, and that they were impaired Burgess's inability to control his pedophilia. Dr. Fields observed that Burgess "seem[ed] to have a very difficult problem with impulse control in general," and that he was "not able to control his impulses or his behavior even while somebody's watching him" as evidenced by his commission of a sexual offense while he was on probation. Dr. Fields also found that Burgess had a high degree of psychopathy, which, when combined with his sexual deviancy, brought "his risk of sexual recidivism up fairly dramatically." She also described Burgess's past pedophilic behavior, indicating that Burgess had both male and female victims of a variety of ages; extra-familial victims; forced genital to genital contact; and a history of sexual offending even after arrest from previous sexual offenses. Dr. Fields agreed with Dr. Nauth that Burgess had failed to complete any treatment program that might have reduced his risk of reoffending.

Viewing this evidence in the light most favorable to the state, the Wisconsin Supreme Court reasonably concluded that the evidence was sufficient from which a rational trier of fact could have found the essential elements necessary for commitment beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (establishing constitutional standard for sufficiency of evidence to support conviction). Not only did the jury hear from all three experts that Burgess had pedophilia–a mental disorder that affected his volition and predisposed him to commit sexually violent acts–but it also heard evidence that other features of his psychological condition made it extremely difficult for him to resist his pedophilic urges. The jury heard that Burgess suffers from an exceptionally toxic combination of mental impairments that made him impulsive and indifferent to the rights of others. In addition, it heard evidence of numerous instances in which Burgess had acted on his pedophilic impulses in the past, providing further support for the conclusion that Burgess had serious difficulty controlling his behavior because of his mental condition. The jury could conclude from these previous instances of violent behavior that Burgess had serious difficulty in controlling his dangerousness, *see Hendricks*, 521 U.S. at 358 ("[p]revious instances of violent behavior are an important indicator of future violent tendencies") (quoting *Heller v. Doe*, 509 U.S. 312, 323 (1993)), particularly where he had failed to complete any treatment that might help him control his impulses.

The validity of this verdict is not undermined by Drs. Fields's and Lodl's testimony that Burgess had the ability to conform his conduct to comply with the law. The record in

Crane contained similar testimony, with the state's experts agreeing that Crane's mental disorder did not impair his volitional control to the degree that he could not control his dangerous behavior. *Crane*, 534 U.S. at 417 (Scalia, J., dissenting). The Supreme Court rejected Crane's contention that the absence of evidence of a total inability to control his dangerous behavior precluded his commitment, holding that the state need only prove "serious difficulty" in controlling behavior. In Burgess's case, the overwhelming evidence showed that in spite of the fact that Burgess might be able to comply with the law, he had *not* controlled his sexually violent behavior in the past and he would have serious difficulty doing so in the future. This evidence, "when viewed in light of . . . the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself," was sufficient to permit a rational trier of fact to conclude that Burgess was not a "dangerous but typical recidivist" but rather that he was substantially likely to commit sexually violent offenses in the future because of his mental condition. *Crane*, 534 U.S. at 413.

In sum, the Wisconsin Supreme Court reasonably concluded that the evidence adduced at trial was sufficient to support the jury's conclusion that Burgess was dangerous because he suffered from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence, and that Burgess had suffered no deprivation of due process. This court should deny habeas relief to Burgess on this claim.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the petition of Stephen Burgess for a writ of habeas corpus be DENIED.

Entered this 19th day of January, 2005.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge