STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT THREE

In re the Commitment of HOWARD C. CARTER:

STATE OF WISCONSIN,

Petitioner-Respondent,

v. Case No. 2015AP01311

HOWARD C. CARTER,

Respondent-Appellant.

ON NOTICE OF APPEAL OF AN ORDER DENYING A PETITION FOR DISCHARGE ORDERED AND ENTERED BY BROWN COUNTY CIRCUIT COURT, BRANCH 4, CIRCUIT JUDGE KENDALL M. KELLEY PRESIDING

RESPONDENT-APPELLANT'S BRIEF AND APPENDIX

SISSON AND KACHINSKY LAW OFFICES
By: Len Kachinsky
State Bar No. 01018347
103 W. College Avenue #1010
Appleton, WI 54911-5782
Phone: (920) 993-7777
Fax: (775) 845-7965
E-Mail: LKachinsky@core.com

Attorneys for the
Respondent-Appellant

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RESPONDENT-APPELLANT'S BRIEF

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN DENYING CARTER A TRIAL ON HIS PETITION FOR DISCHARGE BECAUSE 2013 ACT 84 and 2011 ACT 2 DID NOT APPLY TO THIS CASE AND COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THEIR APPLICATION?

The trial court answered this question in the negative.

II. IF 2013 ACT 84 APPLIED TO THIS CASE, WAS IT UNCONSTITUTIONAL BECAUSE IT UNDULY RESTRICTED ACCESS TO

THE COURTS FOR PERSONS COMMITTED UNDER CHAPTER 980 SEEKING TO TERMINATE THEIR COMMITMENT?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the respondent-appellant (Carter) believes that the briefs of the parties will fully meet and discuss the issues on appeal. Publication may be warranted as this case involved the retroactive application of 2013 Act 84 to Chapter 980 discharge petitions filed before Act 84's effective date of December 14, 2013 and the constitutionality of the increased restrictions on the right to a discharge trial contained in 2013 Act 84. This issue is pending in a number of other appeals before this court or at the trial court level.

STATEMENT OF THE CASE

On February 5, 2009, following a jury trial and verdict (68), Circuit Judge Kendall Kelley committed Carter as a sexually violent person (SVP) under Chapter 980, Wisconsin Statutes (69). The commitment order was upheld by this court in Case No. 2009 AP 01742 on April 6, 2010 (86). On February 11, 2013, Carter signed and on February 26, 2013 filed a petition for discharge (125). Carter also filed a petition for supervised release (127). On February 12, 2013, Attorney Eric Pangburn was appointed to represent Carter (121). Carter waived the time

limits for a decision on his petitions (129). At Carter's request, the court appointed Diane Lytton as a respondent's expert (131). During the interim, the court conducted a series of status conferences while waiting for the report and did not conduct a probable cause hearing on the February 12, 2013 petition. On December 13, 2013, Carter filed another petition for discharge through counsel with a report by Diane Lytton which found that Carter met criteria for discharge (143). The report found Carter no longer met SVP criteria based upon the defects in Static 99R base rates, the MATS-I and Carter's improved behavior at Sand Ridge Secure Treatment Center (SRSTC). The day after Carter's new petition was filed, 2013 Act 84, which changed the procedure for entitlement to a discharge trial, became effective.

Probable cause hearings were held on February 6, 2014; May 23, 2014; and June 24, 2014 (194-196). At the June 24, 2014, the court denied the petition for discharge (196: 38-54) and entered a written order on August 8, 2014 (164; App. 101). Carter filed a timely notice of intent to purse post dispositional relief on July 18, 2014 (162). Sec. 809.30(2)(b), Wis. Stats.[1]

The undersigned attorney was appointed to represent Carter in post dispositional proceedings and filed a post-dispositional motion on December 30, 2014 (166, App. 102-117). The court held a hearing on the post-dispositional motion on April 24, 2015 (198). On June 30, 2015, the court issued a written

[1] Sec. 809.30(2) provides in part that "If the record discloses that sentencing or final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after sentencing or final adjudication on the day of the sentencing or final adjudication.

decision and order denying the post dispositional motion (189, App. 119-136). Carter subsequently filed a notice of appeal (190) directed at the order denying his petition for discharge and the denial of his post-commitment motion.

STATEMENT OF FACTS

A. The Lytton Report.

The basis for Carter's December 13, 2013 discharge petition (143) was the report by Diane Lytton PhD. (Lytton Report) attached to it. Dr. Lytton's report concluded that Carter did not have a mental disorder under Chapter 980 and that his risk to reoffend was not "more likely than not." (143: 2). Carter had advanced to Phase 2 of treatment at Sand Ridge Secure Treatment Center (SRSTC) (143: 3). During her clinical interview, Lytton noted that Carter's behavior at SRSTC had improved; that he attended church; that he was taking college classes; and was regarded as a good worker (143: 3-5). Carter's Static 99R score was either 8 or 9 with a 5 year recidivism rate of 29-39 percent (143: 6). On the MATS-1, an instrument not used during other evaluations, Carter's risk to reoffend was 36 percent over 8 years (143: 6). The "High Risk/Needs" base rate sample had a large amount of out-of-date sex offenders in the sample and thus was not used

(143: 6). Carter's age was approaching 40[2] which further reduced his risk (143: 6). Lytton's opinion was that Carter understood his prior attitudes toward sex and women and that he had made significant treatment progress (143: 6).

B. Court Proceedings after the December 13, 2013 Petition Filed.

Attorney Pangburn stated at the February 6, 2014 hearing that the Act 84 standard applied (194: 6, 18). He did not argue that the *Arends* standard should apply and did not challenge the court's use of *Daubert* in assessing the sufficiency of the MATS-1 which was a major basis of Lytton's expert opinion. Pangburn also did not challenge the constitutionality of 2013 Act 84 if it applied to Carter's petition for discharge. The State conceded that under *Arends* there might have been sufficient facts alleged in the amended petition which included the report by Lytton referencing Carter's improved behavior and new science to warrant a discharge trial (194: 12, 16-17, 23-24). The court expressed concern that the it had the burden under Act 84 to possibly shortcut the fact-finding process (194: 21-22).

At the continued probable cause hearing on June 24, 2014, , the court, without objection by counsel, considered in a colloquy with ADA Greene whether the MATS-1 was sufficient under *Daubert* (196: 7-15). Attorney Pangburn argued that the Lytton report demonstrated changes in Carter and the research since Carter's February 5, 2009 commitment trial sufficient to warrant a discharge

[2] Carter's date of birth was 2/08/1976. Thus, he will turn 40 on 2/08/2016.

trial (196: 18-25). Pangburn also suggested a *Daubert* hearing was appropriate (196: 25-28). ADA Greene made further arguments regarding *Daubert*'s application to the court's analysis (196: 28-31). The court ruled that Carter was not entitled to a discharge trial (196: 38-54).

C. Testimony at Post Commitment Motion Hearing and Decision.

At the hearing on April 24, 2015, Attorney Eric Pangburn testified that he was aware of the enactment of 2013 Act 84 that was effective December 14, 2013 (198: 9, 18). Pangburn's opinion was that Act 84 rather than prior law applied to Carter's petition (198: 10). Act 84 made it more difficult for Carter to get a trial on discharge (198: 12). Pangburn was aware of 2011 Act 2[3] which required the court to act as more of a gatekeeper for expert evidence (198: 13). Pangburn was aware of the *Alger* case which held that Act 2 did not apply to Chapter 980 cases filed before its effective date (198: 14). As a general rule in 980 cases, Pangburn believed that Act 2 benefited respondents (198: 16, 17-18, 19-20). Pangburn did not consider challenging the constitutionality of 2013 Act 84 on the grounds it violated procedural and substantive due process (198: 15-16).

Carter's position was that if *Arends* applied Carter was entitled to a discharge trial but the State held the opposite opinion (198: 23).

[3] In this brief, Carter will refer to "Act 2" and "*Daubert*" interchangeably as that was the meaning of the terms to the litigants.

In his decision and order dated June 25, 2015, Judge Kelley found that Act 84 applied to discharge petitions such as the one filed by Carter that were filed before the effective date of Act 84 but still pending at the time Act 84 took effect (189: 8; App. 126). Further, the facts alleged in Carter's discharge petition were not sufficient for a discharge trial even under *Arends*, the effective standard prior to Act 84 (189: 10-11; App. 128-129). Act 84 was procedural rather than substantive in its changes to Chapter 980 discharge procedures (189: 11; App. 129). Act 84 did not unconstitutionally restrict Carter's access to the courts or an impartial factfinder (189: 13-15; App. 131-133). Attorney Pangburn was not ineffective for not opposing the application of Act 84 to Carter's discharge petition (189: 15-16; App. 133-134). Judge Kelley also found that Pangburn was not ineffective for failing to object to the court's *Daubert* analysis of the Lytton Report instead of arguing that the law prior to 2011 Act 2 applied (189: 16-18; App. 134-136).

Further facts will be stated in the argument below.

ARGUMENT

I. CARTER'S DISCHARGE PETITION WAS SUFFICIENT UNDER *ARENDS* TO WARRANT A DISCHARGE TRIAL.

A. Standard of Review.

The issue of whether facts alleged in Carter's petition for discharge were sufficient to warrant a discharge trial is a matter of law.. The interpretation and application of a statute to an undisputed set of facts are questions of law that the Court of Appeals reviews independently. *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 10, 318 Wis.2d 553, 769 N.W.2d 481 (citation omitted). Thus, this court reviews Judge Kelley's decision that he would have denied Carter's petition for discharge even under the *Arends* standard that prevailed before 2013 Act 84 *de novo*.

B. The facts alleged in the Lytton Report were sufficient to warrant a discharge trial under *Arends*.

The Wisconsin Supreme Court set forth the analysis the trial court was required to engage in as to the disposition of a petition for discharge in *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513.

The *Arends* court stated:

> ¶ 3 We conclude that § 980.09 requires the circuit court to follow a two-step process in determining whether to hold a discharge hearing.
>
> ¶ 4 Under § 980.09(1), the circuit court engages in a paper review of the petition only, including its attachments, to determine whether it alleges facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. This review is a limited one aimed at assessing the sufficiency of the allegations in the petition. If the petition does allege sufficient facts, the circuit court proceeds to a review under § 980.09(2).

> ¶ 5 Wisconsin Stat. § 980.09(2) requires the circuit court to review specific items enumerated in that subsection, including all past and current reports filed under § 980.07.[3] The circuit court need not, however, seek out these items if they are not already within the record. Nevertheless, it may request additional enumerated items not previously submitted, and also has the discretion to conduct a hearing to aid in its determination. The circuit court's task is to determine whether the petition and the additional supporting materials before the court contain any facts from which a reasonable ¶trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person.

Arends, ¶ 3-5.

Sec. 980.09(1), Wis. Stats., which was in effect when Carter filed his discharge petition, provided :

> **980.09 Petition for discharge**. (1) A committed person may petition the committing court for discharge at any time. The court shall deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person.

In this case, the Lytton Report (143: 2-7), referenced Carter's legal and social history and recent behaviors at Sand Ridge Secure Treatment Center (SRSTC) (143: 2-5). She used the MATS-1 instrument not used in previous evaluations (143: 6) and recently discovered defects in part of the Static 99R regarding "an ouit-of-date large sample of sex offenders) in the High Risk/Needs base rate subsample (143: 6). Carter also demonstrated "significant treatment progress" that reduced Carter's risk (143: 4,6). In Lytton's opinion, Carter did not have the required mental disorder for a SVP (143: 2, 5).

Judge Kelley downplayed the significance of new research and observations referenced in Lytton's report during the colloquy with counsel (196: 9-32 48-49). He choose instead to criticize the report for not containing enough background information on Carter and lack of evidence in Lytton's report that the MATS-1 was commonly used in the field of sexually violent person evaluators (189: 4; App. 122). Lytton's report went beyond the MATS-1 and also reported the problems with application of the Static 99R to Carter and Carter's treatment progress (143: 4, 6). It was clear that the trial court was not applying *Arends* but acting as the more stringent gatekeeper of both the expert testimony under Act 2 (which will be addressed later in this brief) and Act 84.

The new knowledge regarding defects in the Static 99R base rates and the use of the MATS-1 was found by another Court of Appeals panel to be sufficient to warrant a trial in a very recent unpublished case, *State v. Denman*, Case No. 2014 AP 2133 decided on July 9, 2015 (App. 137-145)[4].

There should be little doubt that under *Arends*, Carter had made a sufficient showing that a judge or jury might find the new evidence regarding changes in the science or Carter's progress in treatment sufficiently probative to discharge Carter from his Chapter 980 commitment. Thus, failing to argue that *Arends* applied would be deficient performance and prejudicial if Carter was not entitled to a discharge trial under the more stringent criteria applied under Act 84.

[4] Carter offers this for the purposes permitted in Sec. 809.23(3)(b). Interestingly, the decision did not comment upon the change in discharge procedures from 2013 Act 84 since Denman filed his discharge petition in 2013.

II. 2013 ACT 84, WHICH MADE INCREASED REQUIREMENTS FOR A TRIAL ON DISCHARGE PETITIONS, SHOULD NOT HAVE BEEN APPLIED TO THE PETITION IN THIS CASE THAT WAS FILED PRIOR TO ITS EFFECTIVE DATE. FAILURE TO ARGUE OTHERWISE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

The standard of review for whether Act 84 applied to Carter's discharge petition is also *de novo* as it is an issue of law. See I(A) above. As to ineffective assistance of counsel, the trial court's findings as to what the attorney did, what happened at trial and the basis for the challenged conduct are factual and will be upheld on appeal unless they are clearly erroneous. *State v. Weber*, 174 Wis. 2d 98, 496 N.W.2d 762, 768 (Wis. App. 1993). However, whether counsel's actions were deficient is a question of law to be determined independently by the reviewing court. *State v. Hubanks*, 173 Wis. 2d 1, 496 N.W.2d 96, 104-05 (Wis. App. 1992).

B. 2013 Act 84 should not have been applied to Carter's petition as the discharge petition was filed before its effective date.

The effective date of 2013 Act 84 was the day after publication, to wit: December 14, 2013. Sec. 991.11, Wis. Stats. Application of the effective date

issue in this case is complicated because it is unclear how Act 84 applies to cases with discharge petitions already "in the pipeline" at the time the law took effect.

There is an ambiguity on the issue of whether the new or old provisions apply if, as in this case, a petition for discharge was filed under the old provisions but the probable cause hearing had not been held by the effective date of Act 84.

In other Chapter 980 proceedings, the State has characterized the issue as being whether the change regarding a Chapter 980 patient's access to a trial on discharge was remedial or procedural rather than substantive[5]. If remedial or procedural, the State contended that Act 84 was retroactive not only to discharge petitions filed on or after December 14, 2013 but those filed before that date that had passed the two hurdles of the *Arends*[6] "paper review" to warrant a discharge trial.

The Wisconsin Supreme Court's most recent review on retroactivity of a "procedural" statute to cases already "in the pipeline" was *Trinity Petroleum v. Scott Oil Co*., 2007 WI 88, 302 Wis.2d 299, 735 N.W.2d 1. In *Trinity Petroleum*, Scott Oil, a successful movant for summary judgment, requested costs and fees from Trinity Petroleum for a frivolous action. While the motion for summary judgment was pending decision, Sec. 802.05, Wis. Stats. was enacted that limited award of costs and fees to cases where a "safe harbor" letter was sent to the offending party. Five days after the new rule was effective, the trial court ruled in

[5] Trial court proceedings in *State v. Jesse Williams* in Outagamie County (08 CI 01), which is pending post-commitment proceedings. This case appears to be pending before this court in Case No. 2013XX000761.

[6] *In re Commitment of Arends*, 2010 WI 46, 325 Wis.2d 1, 784 N.W.2d 513.

favor of Scott Oil whose subsequent request for costs and fees was denied because the new "safe harbor" statute had not been complied with. Trinity Petroleum argued that the newly enacted Sec. 802.05 was retroactive because it was procedural. The *Trinity Petroleum* court noted that

> ¶ 53 Retroactive application of procedural rules is not, however, an absolute rule. For example, a procedural statute will not have retroactive application if it impairs contracts or disturbs vested rights. The court has stated that "it is a fundamental rule of statutory construction that a retroactive operation is not to be given so as to impair an existing right or obligation otherwise than in matters of procedure . . . ."41 Furthermore, retroactive application of a procedural rule must not "impose[ ] an unreasonable burden" upon the party attempting to comply with the procedural requirements of the rule.42
>
> ¶ 54 This court's analysis in *Mosing v. Hagen*, 33 Wis.2d 636, 148 N.W.2d 93 (1967), is particularly instructive in teaching that retroactive application of procedural rules is not absolute. *Mosing* held that a statute (that was adopted by the court through its rulemaking authority pursuant to Wis. Stat. § 751.12) applied retroactively unless it affected a vested or contractual right or imposed an unreasonable burden upon the party attempting to comply with the procedural requirements.

Trinity Petroleum, ¶53-54.

The issue of retroactively must first be analyzed in terms of whether Carter had a "vested right" to a discharge trial. *Trinity Petroleum* ¶62. In *Trinity Petroleum*, the Supreme Court held that the right to attorneys fees for a party harmed by a frivolous action was not a "vested right." Judge Kelley held that Carter did not have a "vested right" to a discharge trial and thus that Act 84 could be retroactive to his petition as a new procedural rule (189: 10; App. 128).

Carter disagrees. This case involves a deprivation of liberty and access to an impartial fact finder by an institutionalized person rather than a monetary award that was at issue in *Trinity Petroleum*. In order for a deprivation of liberty in a civil commitment to be constitutional, it must have mechanisms for periodic review and access to a hearing. See *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985). On that grounds alone, Act 84 should not be applied retroactively to this case. See discussion later in (IV) on the constitutionality of Act 84's greater restrictions on access to a trial for persons seeking discharge from a Chapter 980 commitment.

The *Trinity Petroleum* court also cited with approval federal cases that held that the similar amendment to FRCP 11 was held not to apply to a motion filed under the old rule. *Trinity Petroleum*, ¶72. It did not make a definitive ruling as to retroactively but held that while procedural rules were generally retroactive, case-specific determinations must be made so that a new procedural rule did not diminishes a contract, disturbs vested rights, or imposes an unreasonable burden on the party charged with complying with the new rule's requirements. *Trinity Petroleum*, ¶100.

In this case, Carter submits the new burden imposed upon him to warrant a discharge trial ("allegation of facts" or "change in a person's condition" from the record as a whole from which the court or jury would "likely" conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits) would be an unreasonable one. This court

can avoid the constitutional issue by finding that Act 84 is not retroactive as to discharge petitions already filed by Act 84's effective date.

Based upon the *Arends* standard, Carter submits that the Lytton report which referenced Carter's improved behavior and new research was sufficient to warrant a discharge trial. See (I) above. It was evidence of change since the last fact finding hearing from which a judge or jury could find Carter was no longer a SVP. The criticisms of the MATS-1 by the State and Judge Kelley and arguments that Carter's change in behavior was insufficient would go to the weight of the evidence. Under *Arends*, Judge Kelley could not simply weigh the opinions of experts against one another:

> ¶ 40 We reject the State's argument that the circuit court may weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner. This is impermissible because the standard is not whether the evidence more heavily favors the petitioner, but whether the enumerated items contain facts that would allow a factfinder to grant relief for the petitioner.[22] If the enumerated items do contain such facts, the presence of evidence unfavorable to the petitioner—a re-examination report reaching a conclusion that the petitioner was still more likely than not to sexually reoffend, for example—does not negate the favorable facts upon which a trier of fact might reasonably rely.

Arends, ¶ 40.

If this court finds that 2013 Act 84 is applicable to the issue of Carter' access to a trial before an impartial fact finder as to his continued status as a

sexually violent person (SVP), Carter reluctantly agrees with the State that the state of the record would not support the right to a trial on discharge as the burden would be on him under Act 84 to establish on the record as a whole a fact finder would "likely conclude" that he no longer is an SVP. Although Diane Lytton concluded that Carter was no longer an SVP, state examiners since the 2009 initial commitment have consistently found otherwise. A substantial conflict in expert opinions means that Carter cannot meet his burden of proof even though at a discharge trial itself, the burden of proof would be on the State by clear and convincing evidence. Sec. 980.09(3), Wis. Stats. 2013 Act 84 should not be applied to Carter' access to a discharge trial in this case.

If this court finds that Act 84 should not apply, the State might claim the issue was waived by Attorney Pangburn' s failure to object to arguments by the State that it did. In that event, the error by Pangburn as to the applicable law that clearly made a difference in the outcome of whether Carter 's discharge petition resulted in a trial was deficient performance.

An attorney's performance is not deficient unless it is shown that, "in light of all of the circumstances, the identified facts or omissions were outside the wide range of professionally competent assistance." *State v. Guck*, 170 Wis. 2d 661, 490 N.W.2d 34, 38 (Wis. App. 1992), aff'd, 176 Wis. 2d 845, 500 N.W.2d 910 (1993). The Court of Appeals gives great deference to the attorney and every effort is made to avoid determination of ineffectiveness based on hindsight. Instead, the case is reviewed from counsel's perspective at the time of trial and

"the burden is . . . on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 449 N.W.2d 845, 847-48 (1990).

In order for a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish the counsel's actions constituted deficient performance and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). Representation is not constitutionally ineffective unless both elements of the test are satisfied. *State v. Guck*, supra, 490 N.W.2d at 37. Thus, a reviewing court may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. *State v. Johnson*, 153 Wis. 2d 121, 449 N.W.2d 845, 848 (1990). The subject of a 980 petition has the right to counsel. Sec. 980.03(2)a, Wis. Stats. That includes the right to effective assistance of counsel. *State v. Pharm*, 2000 WI App 167, ¶ 16-17, 238 Wis. 2d 97, 617 N.W.2d 163.

If Attorney Pangburn was wrong as to the applicable law that applied to Carter's discharge petition and failed to preserve the issue, it was deficient performance. By definition, knowledge of the applicable law is required for effective assistance of counsel. The error undermined confidence in the outcome of the case. As Pangburn admitted, Act 84 made getting a discharge from a Chapter 980 commitment much more difficult (198: 12). Thus, this court should review that issue as either plain error or ineffective assistance of counsel in spite of the lack of a contemporaneous objection.

III. 2011 ACT 2 (*DAUBERT*) DID NOT APPLY TO THIS CASE.

During the completion of the probable cause hearing on June 24, 2014, the court made reference to the *Daubert* standard regarding the MATS-1 (196: 4). ADA Greene did not initially endorse the use of *Daubert* but mentioned that very few 980 evaluators used that instrument (196: 4-5). Later Greene stated he had done *Daubert* hearings on the Static 99R instrument and mentioned more criticisms of the MATS-1 (196: 8-10). The court referred repeatedly to *Daubert* and acceptance of MATS-1 within the scientific community (196: 11,12,15). Pangburn's primary response was to argue that Carter's changes as a person and in the research were sufficient to warrant a trial under the second part of the *Arends* screening process (196: 18-25). Then Pangburn suggested a *Daubert* hearing and responded to a question from the court about its application to Chapter 980 (196: 26-27). The court, Pangburn and Greene continued to discuss *Daubert* as if it applied to Carter's case (196: 27, 28, 48, 49).

Daubert is shorthand for Wisconsin's 2011 Act 2 which adopted that standard for expert testimony and was effective February 1, 2011. After that law was passed, litigation ensued as to how it affected Chapter 980 cases. On November 19, 2013, the Court of Appeals answered that question by holding that 2013 Act 2 did not apply to Chapter 980 cases that were filed before February 1,

2011. *In re Commitment of Alger*, 2013 WI App 148, ¶¶1, 9-22, 352 Wis. 2d 145, 841 N.W.2d 329[7].

Alger preceded the court's discussions of *Daubert* in this case. Counsel and the court should have been aware of it, particularly since ADA Greene was the trial level prosecutor in *Alger*, an Outagamie County case. Even if not then in the bound volumes, counsel and the court could have discovered *Alger* through WSCCA or Fastcase, an on-line database available for free at Wisbar.org to all members of the State Bar of Wisconsin. It was deficient performance not to point out to the court at some time during oral argument that *Daubert* did not apply to Carter's case.

There were other issues as to Carter's right to a discharge trial than the standard to be applied in evaluating the admissibility of the MATS-1. However, the standard for expert testimony applicable to this case because it was filed before the effective date of 2011 Act 2 was the following version of Sec. 907.02, Wis. Stats.:

> **Testimony by experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

While there were arguments that could be made against the reliability of the MATS-1, including the small number of Chapter 980 evaluators that used it, there

[7] That decision was subsequently affirmed by the Wisconsin Supreme Court on January 20, 2015. *In re Commitment of Alger*, 2015 WI 3, 360 Wis.2d 193, 858 N.W.2d 346.

is little doubt that the less restrictive standard would have clearly allowed the MATS-1 to admissible at any subsequent hearings in this case. The former law did not place as many restrictions upon expert testimony as exist under 2011 Act 2.

It is not clear that the court denied Carter's request for a discharge trial solely because it applied the wrong standard on admissibility of expert opinions. However, it was certainly part of the calculus by which court made it final decision on the matter. This issue may arise again if Carter is not discharged from his Chapter 980 commitment following this litigation. If Attorney Pangburn had objected to use of the *Daubert* analysis, the significance of the Lytton report in demonstrating a sufficient change based upon a change in the research to warrant a trial would have more clear if the discharge petition was analyzed under *Arends* rather than Act 84. Attorney Pangburn believed that *generally* that Act 2 benefited respondents in Chapter 980 cases (198: 16, 17-18, 19-20). Judge Kelley also found that Pangburn was not ineffective because of that reason (189: 17; App. 135). But the issue was not whether a particular issue of law *generally* benefited one class of clients . Pangburn's duty was to provide competent representation to Carter, not to a class of clients. SCR 20:1.1. Pangburn was aware of the *Alger* Court of Appeals decision at the time of his representation of Carter (198: 14). Regardless of what position Pangburn may have taken in other Chapter 980 cases he should have taken the position in Carter's case that benefited Carter,

particularly since there was binding case law that favored Carter's position at the time of the hearings on the discharge petition.

IV. IF 2013 ACT 84 APPLIED TO THIS CASE, IT WAS UNCONSTITUTIONAL BECAUSE IT DENIED EFFECTIVE ACCESS TO THE COURTS AND DUE PROCESS.

A successful challenge to the constitutionality of a statute requires that the person challenging the statute establish beyond a reasonable doubt that the statue is constitutionally infirm and the court must give the statue every reasonable presumption in favor of its validity. *State v. Ransdell*, 2001 WI App 202 ¶5, *247 Wis. 2d 613, 634 N.W.2d 871* . A civil commitment for any purpose constitutes a significant deprivation of liberty. *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804 1809, 60 L.Ed.2d 323 (1979) . A strict scrutiny analysis is appropriate in Chapter 980 cases because of the liberty interest involved. *State v. Carter*, 2001 WI App 263, ¶ 6., 249 Wis. 2d 1, 637 N.W.2d 791. In order for a deprivation of liberty in a civil commitment to be constitutional, it must have mechanisms for periodic review and access to a hearing. See *State ex rel. Watts v. Combined Cmty. Servs. Bd*., 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

Constitutionally adequate process is a flexible concept that "cannot be divorced from the nature of the ultimate decision that is being made." *Parham v. J.R.*, 442 U.S. 584, 608, 99 S.Ct. 2493 2507, 61 L.Ed.2d 101 (1979). It is well settled that people who are lawfully involuntarily committed must be released once the

grounds for the initial commitment no longer exist. See *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S.Ct. 2486, 2493, 45 L.Ed.2d 396 (1975) (where a plaintiff challenged his continued confinement in a mental institution and the Court explained that "even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed"); *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972) (where the Court held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed"). Thus, when someone is civilly committed, there must be some form of periodic post-commitment review. See *Parham*, 442 U.S. at 607, 99 S.Ct. at 2506 (holding that continuing need for commitment must be reviewed periodically).

To determine what process is due, courts turn to the test from 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) which requires the balancing of a number of considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

substitute procedural requirement would entail. *Id.,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The Supreme Court in *Mathews* admonished courts employing this test to recognize that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Id*. at 344, 96 S.Ct. at 907.

In facial due process challenges, the appellate courts have looked to the statute as written to determine whether the procedure provided comports with due process. Appellate courts do not simply rely on the government's description of how the statute operates in practice. See *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1269 (11th Cir.2011) (holding a statute unconstitutional facially and as-applied because as written it failed to provide "constitutionally adequate procedural protections" despite the City's arguments about how the statute operates in practice). A chapter 980 commitment is inherently an adversary process pitting concerns about public safety against an individual's liberty.

The issue in this case is whether the more restrictive scheme for access to a hearing by an impartial fact-finder is sufficiently justified by the State interest balanced against the liberty interest of the individual. Carter submits it is not.

In State v. Gilbert , 2012 WI 72, 342 Wis.2d 82, 816 N.W.2d 215, the Wisconsin Supreme Court summarized the purpose and intent of Chapter 980 as follows:

¶ 23 The primary goal of Wis. Stat. ch. 980 is two-fold: 1) the treatment of sexually violent persons, and 2) the protection of society from those persons. See *State v. West*, 2011 WI 83, ¶ 27, 336 Wis.2d 578, 800 N.W.2d 929, *State v. Post*, 197 Wis.2d 279, 308, 541 N.W.2d 115 (1995); *Carpenter*, 197 Wis.2d at 271, 541 N.W.2d 105 ("[T]he principal purposes of ch. 980 are the protection of the public and the treatment of convicted sex offenders." (quoting *Jones v. United States*, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983))). This purpose highlights the fact that ch. 980 is not a punitive provision, but instead provides a means for treating sexually violent persons "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, 541 N.W.2d 105.

¶ 24 We have consistently interpreted Wis. Stat. ch. 980 in light of this purpose. In *West*, we reviewed the history of several amendments to ch. 980, emphasizing that, with each successive amendment, the legislature has increasingly demonstrated its concern for the protection of the public. 336 Wis.2d 578, ¶¶ 42–44, 800 N.W.2d 929 (discussing three separate amendments that added protections for the public from sexually violent persons).

¶ 25 In *State ex rel. Marberry v. Macht*, we held that "[r]elease of a ch. 980 patient whose dangerousness or mental disorder has not abated serves neither to protect the public nor provide care and treatment for the patient." 2003 WI 79, ¶ 30, 262 Wis.2d 720, 665 N.W.2d 155,cert. denied540 U.S. 997, 124 S.Ct. 501, 157 L.Ed.2d 399 (2003). In that case, we declined to order the release of a sexually violent person, because release was "not justifiable under the dual purposes of the statute: protection of the public from sexually violent persons likely to reoffend and care and treatment of the patient." Id. In *State v. Schulpius*, we reiterated our holding in *Marberry* that even "where there was a violation of procedural due process ... release is not only inappropriate, it is not justifiable under the dual purposes of the statute." 2006 WI 1, ¶ 39, 287 Wis.2d 44, 707 N.W.2d 495,cert. denied547 U.S. 1138, 126 S.Ct. 2042, 164 L.Ed.2d 797 (2006) (quoting *Marberry*, 262 Wis.2d 720, ¶ 30, 665 N.W.2d 155).

¶ 26 In light of these cases, it is clear that the protection of the public from sexually violent persons is of central importance in Wis. Stat. ch. 980 cases. We continue our review of ch. 980 with this principle in mind.

Gilbert, ¶24-26.

The question as to 2013 Act 84 is whether Act 84 as applicable to the right of a 980 patient to a trial on his/her discharge petition was narrowly tailored to achieve that purpose as constitutionally required. *State v. Post*, 197 Wis.2d 279, 302, 541 N.W.2d 115, 122 (1995).

Treatment and protection of the public did not require the increased restrictions on access to the courts contained in Act 84. A discharge trial for a committed SVP is simply an opportunity for the SVP to require the State to justify continued institutionalization. An impartial fact finder must still weigh the evidence to determine if the State can justify the civil commitment. As applied to this case, the new criteria for discharge petitions from 980 commitments reduced the access of 980 patients to an impartial tribunal in which competing arguments and evidence can be considered. It did so in a matter which allows the State deprive persons such as Carter of their liberty interest. Carter no longer has the right to a decision by an impartial fact-finder that he is "more likely than not" to reoffend in a sexually violent way if a qualified expert using new facts or research establishes facts from which a judge or jury could find he was no longer a SVP. Instead, Carter must establish that based upon the record as a whole in Sec. 980.09(2) that a court or jury "would likely conclude" that he was no longer a SVP. In other words, conflicting opinions by experts based upon facts regarding the person or research as to changes in a person's opinion would no longer be

sufficient to warrant a trial. The judge responsible for the subject's case would be required to determine whether the subject would likely prevail at trial and become the more restrictive gatekeeper *Arends* did not allow.

The ability of the State to continue to detain a patient without a trial before an impartial fact finder simply because the patient cannot establish to a judge's satisfaction that he is likely to win a trial amounts to unconstitutional preventive detention. It is a significantly different statutory scheme than existed at the time Chapter 980's constitutionality was upheld in *State v. Carpenter*, 197 Wis.2d 252, 274, 541 N.W.2d 105, 113 (1995).

Further, application of the changes contained in Act 84 significantly restricting the availability of a discharge trial before an impartial fact-finder to Chapter 980 subjects such as Carter after he was committed by a judge or jury is in itself a violation of due process. Admittedly, *State v. Tory Rachel*, 2002 WI 81, ¶ 66, 224 Wis. 2d 571, 591 N.W.2d 920, held that the 1999 amendments requiring initial placement in a secure treatment facility and delaying eligibility for seeking supervised release met constitutional muster. However, the concurring opinion of Justice Bradley voiced concerns about the constitutionality of the increasingly restrictive supervised release provisions reviewed in that case. *Rachel*, supra, ¶¶ 71-87. Justices Abrahamson and Bablitch found them unconstitutional altogether. *Rachel*, supra ¶¶ 88-102.

Carter submits that the most recent amendment to discharge procedures contained in Act 84 push this scheme even further down the slippery slope of

unconstitutional preventive detention and violates due process. The latest effort of the legislature to plug "loopholes" in Chapter 980 was motivated by a dramatic increase in discharge petitions due to a revised statutory scheme that made it easier to petition for discharge than for supervised release. As a result, however, a barely constitutional scheme designed to protect the public from highly dangerous sexual predators is now an unconstitutional scheme of preventive detention. The State need only satisfy a judge that a 980 patient is unable to establish that a fact finder would likely conclude he was no longer a SVP to deprive a 980 patient of a trial. As Judge Kelley observed, this gave the courts dramatically increased gatekeeping powers (194: 21-22). It was much greater, for example, than the bars to a hearing during a Chapter 51 commitments. See §51.20(16), Wis. Stats. Under Chapter 51, the only requirement for an unfettered right to a trial is the passage of 120 days. Longer temporal requirements and even proof requirements might be reasonable because the nature of the mental disorders that result in commitment under Chapter 980 are more long lasting and difficult to treat than the mental illnesses under Chapter 51. However, a well-considered expert opinion based upon facts from new research or changes in a person's behavior with which other experts may disagree should be enough to entitle a Chapter 980 subject a trial before an impartial fact finder. Juries and judges are not bound by the opinion of any expert. Wis. JI *Criminal* 200. Judge Kelley cited the right of a Chapter 980 person to file a petition for discharge at any time to support the argument that Act 84 did not deprive Carter of his right to the courts and an

impartial factfinder (189: 14; App. 132). He also cited the "compelling interest" of the State in "keeping frivolous or minimally credible petitions from proceeding to a discharge trial at the expense of public resources" as a sufficient justification for the legislatively enacted restrictions (189: 14; App. 132). However, those "compelling" interests were not so great as to deprive a Chapter 980 subject from access to a trial if he had a properly qualified expert with an opinion based sufficient with which other evaluators might disagree. Such was the case here where Lytton's opinion (143: 2-7) was different from the most recent re-examination prior to Lytton's report by Sand Ridge psychologist, Dr, Scott Woodley (130).

As a practical matter, the new limits on the right to a discharge trial make discharge without approval from the State practically impossible. It is difficult to conceive of how any Chapter 980 patient can meet his burden for the right to a discharge trial if he has to first prove he is likely to win in a paper review. An SVP would most likely not be able to get a discharge trial unless a State psychologist supported his petition. This burden upon an SVP seeking an impartial fact finder to decide whether his continued institutionalization is justified is more than due process permits.

Justice Bradley's fear in her 2002 concurrence in *Rachel* that Chapter 980 would morph into an unconstitutional form of preventive detention has been realized. This latest barrier to release from a Chapter 980 commitment is far beyond the limits on government the Founding Fathers wrote into the United

States and Wisconsin Constitutions. 2013 Act 84's new restrictions on access by Chapter 980 patients to a trial before an impartial fact finder on their status as a SVP violates substantive and procedural due process. It is unconstitutional.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the trial court's order denying Carter's discharge petition and order denying post-commitment motion and remand with instructions to conduct a discharge trial.

Dated this 9th day of September 2015.

SISSON AND KACHINSKY LAW OFFICES
By: Len Kachinsky
Attorneys for the Respondent-Appellant
State Bar No. 01018347
103 W. College Avenue #1010
Appleton, WI 54911-5782
Fax: (775) 845-7965
Phone: (920) 993-7777
E-Mail: LKachinsky@core.com

CERTIFICATION AS TO LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 7419 words, including certifications.

Dated this 9th day of September 2015

LEN KACHINSKY

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I hereby certify that:

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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of September 2015

LEN KACHINSKY