

STATE OF WISCONSIN
IN SUPREME COURT

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In re the Commitment of HOWARD C. CARTER:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

Case No. 2015AP01311

HOWARD C. CARTER,

Respondent-Appellant-Petitioner.

ON REVIEW OF A DECISION BY THE COURT OF APPEALS
DISTRICT 3 AFFIRMING AN ORDER DENYING A PETITION FOR
DISCHARGE AND ORDER DENYING POST-COMMITMENT MOTION
ORDERED AND ENTERED BY BROWN COUNTY CIRCUIT COURT,
BRANCH 4, CIRCUIT JUDGE KENDALL M. KELLEY PRESIDING

**RESPONDENT-APPELLANT-PETITIONER'S BRIEF AND
APPENDIX**

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TABLE OF CONTENTS

ISSUES PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
A. <u>The Lytton Report</u>	5
B. <u>Court Proceedings after the December 13, 2013 Petition Filed</u>	6
C. <u>Testimony at Post Commitment Motion Hearing and Decision</u>	7
ARGUMENT.....	9
I. CARTER’S DISCHARGE PETITION WAS SUFFICIENT UNDER ARENDS TO WARRANT A DISCHARGE TRIAL....	9
A. <u>Standard of Review</u>	9
B. <u>The facts alleged in the Lytton Report were sufficient to warrant a discharge trial under Arends.</u>	9
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.....	13
A. <u>Standard of Review</u>	13
B. <u>2013 Act 84 should not have been applied to Carter’s petition as the discharge petition was filed before its effective date</u>	14
III. 2013 ACT 84, IF READ TO ALLOW WEIGHING CONTRARY TO	

<i>ARENDS</i> , WAS UNCONSTITUTIONAL BECAUSE BY INCREASING CARTER’S BURDEN OF PRODUCTION IT DENIED CARTER EFFECTIVE ACCESS TO THE COURTS AND DUE PROCESS.....	21
CONCLUSION	29

CASES CITED

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)	22
<i>Catron v. City of St. Petersburg</i> , 658 F.3d 1260 (11th Cir.2011)	24
<i>Estate of Genrich v. OHIC Ins. Co.</i> , 2009 WI 67,318 Wis.2d 553, 769 N.W.2d 481.	9
<i>Jackson v. Indiana</i> , 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).....	23
<i>Matthews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	23, 24
<i>O'Connor v. Donaldson</i> , 422 U.S. 563, 95 S.Ct. 2486 , 45 L.Ed.2d 396 (1975)...	22
<i>Parham v. J.R.</i> , 442 U.S. 584, 99 S.Ct. 2493 2507, 61 L.Ed.2d 101 (1979).....	22, 23
<i>State ex rel. Watts v. Combined Cmty. Servs. Bd.</i> , 122 Wis. 2d 65, 362 N.W.2d 104 (1985).....	17
<i>State v. Arends</i> , 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513....	9, 10, 11, 15, 18
<i>State v. Carpenter</i> , 197 Wis.2d 252, 541 N.W.2d 105 (1995).....	21, 27
<i>State v. Howard Carter</i> , 2017 WI App 9, 373 Wis. 2d 722, ___N.W.2d____.	5
<i>State v. Carter</i> , 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 79	22
<i>State v. Gilbert</i> , 2012 WI 72, 342 Wis.2d 82, 816 N.W.2d 215.....	24-25
<i>State v. Guck</i> , 170 Wis. 2d 661, 490 N.W.2d 34 (Wis. App. 1992), aff’d, 176 Wis. 2d 845, 500 N.W.2d 910 (1993).....	20

<i>State v. Hager</i> , 2017 App. 8,, 373 Wis2d 692, ___ N.W.2d ___ ,,,,,,,,,,,,,,	11-12, 19
<i>State v. Hubanks</i> , 173 Wis. 2d 1, 496 N.W.2d 96 (Wis. App. 1992).....	14
<i>State v. Johnson</i> , 153 Wis. 2d 121, 449 N.W.2d 845 (1990).....	20
<i>State v. Pharm</i> , 2000 WI App 167, 238 Wis. 2d 97, 617 N.W.2d 163.....	20
<i>State v. Post</i> , 197 Wis.2d 279, 541 N.W.2d 115 (1995).....	26
<i>State v. Tory Rachel</i> , 2002 WI 81, 224 Wis. 2d 571, 591 N.W.2d 920.....	21, 28
<i>State v. Ransdell</i> , 2001 WI App 202, 247 Wis. 2d 613, 634 N.W.2d 871	22
<i>State v. Weber</i> , 174 Wis. 2d 98, 496 N.W.2d 762, 768 (Wis. App. 1993).	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). ...	19
<i>Trinity Petroleum v. Scott Oil Co.</i> , 2007 WI 88, 302 Wis.2d 299, 735 N.W.2d 1.....	15-16, 17

WISCONSIN STATUTES CITED

Sec. 51.20(16).....	29
Sec. 802.05.....	12, 13
Sec. 809.19(8)(b) and (c).	32
Sec. 809.19(12).	32
Sec. 980.03.....	17
Sec. 980.09.	10, 27
Sec. 991.11.....	14

OTHER AUTHORITIES CITED

2013 Act 84.....	<i>passim</i>
Wis. JI <i>Criminal</i> 200.....	29

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RESPONDENT-APPELLANT-PETITIONER'S BRIEF

ISSUES PRESENTED

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

The trial court and the Court of Appeals answered this question in the negative. The issue was raised in the trial court and in the briefs of the parties to the Court of Appeals.

II. IF 2013 ACT 94 APPLIED TO THIS CASE, SHOULD THE SAVING CONSTRUCTION APPLIED BY THE COURT OF APPEALS IN *HAGER* BE APPLIED AND WAS CARTER ENTITLED TO A DISCHARGE TRIAL UNDER THAT CONSTRUCTION?

Neither the trial court and the Court of Appeals answered this question. The issue was not raised in the trial court but the construction issue was raised in the decision of the Court of Appeals in this case and *State v. Hager* which this court also accepted for review and which is included in the appendix to this brief (App. 132-156).

III. 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 and the Court of Appeals answered this question in the negative. The issue was raised in the trial court and in the briefs of the parties to the Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is routinely held in cases accepted for review by this court. Publication is also appropriate in cases accepted for review by this court.

Both the questions of retroactivity of 2013 Act 84 and its constitutionality are novel ones, the resolution of which will have statewide impact. Further, the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

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 pursue post dispositional relief on July 18, 2014 (162). Sec. 809.30(2)(b), Wis. Stats.¹

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."

The undersigned attorney was appointed to represent Carter in post dispositional proceedings and filed a post-dispositional motion on December 30, 2014 (166). The court held a hearing on the post-dispositional motion on April 24, 2015 (198). On June 30, 2015, the court issued a written decision and order denying the post dispositional motion (189, App. 114-131). 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. On January 24, 2017, the Court of Appeals affirmed the order denying the petition for discharge and post-commitment motion (App. 101-112). This case was ordered published on February 22, 2017 and is now cited as *State v. Carter*, 2017 WI App 9, 373 Wis. 2d 722, ____N.W.2d____.

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 40² 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

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

84³ 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 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 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

³ This legislation will also be referred to as “Act 84” in this brief.

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 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 opinion⁴ (198: 23).

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. 121). 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. 123-124). Act 84 was procedural rather than substantive in its changes to Chapter 980 discharge procedures (189: 11; App. 124). Act 84 did not unconstitutionally restrict Carter's access to the courts or an impartial factfinder (189: 13-15; App. 126-128). Attorney Pangburn was not ineffective for not opposing the application of Act 84 to Carter's discharge petition (189: 15-16; App. 128-129).

⁴ This differed from its position at an earlier hearing (194: 12, 16-17, 23-24).

Further facts will be stated in the argument below.

ARGUMENT

I. CARTER’S DISCHARGE PETITION WAS SUFFICIENT UNDER *ARENDS* AND *HAGER* 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 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* and *Hager*.

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.

The Court of Appeals interpreted 2013 Act 84 in a way that did not allow the trial court to weigh the evidence for and against a petition and sustained most of this court's previous decisions regarding the process for obtaining a discharge trial set forth in *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513 (App. 119-120). See also decision of the Court of Appeals the same day as this case authored by the same judge in *State v. Hager*, (Case No. 15 AP 330) 2017 App. 8, ¶43, 373 Wis2d 692, ____ N.W.2d ____ (App. 131-156).

The Court of Appeals referenced its decision in *Hager* in this case. It held that the changes in 2013 Act 84 simply required a “material increase in the petition’s burden of production” from “may conclude” to “would likely conclude” *Hager*, ¶31. If this court determines it need not address the constitutionality of the changes in 2013 Act 84, this court must clarify or harmonize the law. It is hard to imagine how a trial court determines that a Chapter 980 patient has met the burden under *Arends* but not met its burden under Act 84 without weighing the evidence in some matter.

In *Hager*, the Court of Appeals held that the change in Hager’s burden as a result of Act 84 was that Hager has to show that a fact finder “would

likely conclude” rather than “may conclude” that Hager was no longer a sexually violent person. *Hager*, ¶2. 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 out-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 sexually violent person (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. 117). 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 weighing the evidence.

Under *Arends* and *Hager*, Carter made a sufficient showing that a judge or jury would likely find the new evidence regarding changes in the science or Carter's progress in treatment, taken alone and not weighed against other evidence of record, was sufficiently probative to justify a trial to discharge Carter from his Chapter 980 commitment. While neither Carter's attorney or the trial court had the benefit of *Hager* in their decision-making process, this court should consider whether the matter should be remanded for a determination under *Hager* if Carter was entitled to a discharge trial.

II. 2013 ACT 84, WHICH INCREASED REQUIREMENTS FOR A TRIAL ON DISCHARGE PETITIONS, SHOULD NOT HAVE BEEN APPLIED TO THE DISCHARGE 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 proceedings before the Court of Appeals, the State 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. State’s brief, pages 4-8. 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*⁵ “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 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

⁵ *In re Commitment of Arends*, 2010 WI 46, 325 Wis.2d 1, 784 N.W.2d 513.

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 (III) 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 SVP, it is unclear that the state of the record would 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. The trial court, as argued above, applied a weighing process that was contrary to the saving construction of Act 84 used by the Court of Appeals in *Hager*. Although Diane Lytton concluded that Carter was no longer an SVP, state examiners since the 2009 initial commitment have consistently found otherwise. Under *Hager*, a substantial conflict in expert opinions would not prevent Carter from meeting his burden of production sufficient to warrant a discharge trial. At the 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 block 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.

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*, 170 Wis.2d 661, 490

N.W.2d 34, 38 (1992). 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. 2013 ACT 84, IF READ TO ALLOW WEIGHING CONTRARY TO *ARENDS*, WAS UNCONSTITUTIONAL BECAUSE BY INCREASING CARTER'S BURDEN OF PRODUCTION IT DENIED CARTER EFFECTIVE ACCESS TO THE COURTS AND DUE PROCESS.

The constitutionality of Chapter 980 has been challenged on numerous occasions since its enactment in 1994. In each case since the first challenges in *State v. Carpenter*, 197 Wis.2d 252, 541 N.W.2d 105, 113 (1995) and *State v. Post*, 197 Wis.2d 279, 302, 541 N.W.2d 115 (1995), this court has overruled the challenges because, among other reasons, sufficient opportunity existed for persons committed under Chapter 980 to seek relief from their commitment. See, for example, Justice Bradley's comments in her 2002 concurrence in *State v. Tory Rachel*, 2002 WI 81, ¶¶ 71-87, 224 Wis. 2d 571, 591 N.W.2d 920 that the increasingly restrictive amendments to Chapter 980 threatened to convert the statute into a form of unconstitutional preventive detention.

A successful challenge to the constitutionality of a statute requires that the person challenging the statute establish beyond a reasonable doubt that

the statute is constitutionally infirm and the court must give the statute 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 *Mathews v. Eldridge*, 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. denied 540 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. denied 547 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 manner which allows the State to 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 even 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. A literal plain meaning interpretation of the changes in Act 84 mean that 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 and the weighing of evidence prohibited by *Arends*. 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 pushes 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 barrier to a discharge hearing from 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. 127). 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. 127). 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 if this court does not hold that the *Hager* court’s construction of Act 84 does not save the statute but rewrites it. 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, if read literally, violates substantive and procedural due process. It is unconstitutional.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this Court reverse the decision of the Court of Appeals affirming the trial court's order denying Carter's discharge petition and order denying post-commitment motion and remand with instructions to consider the application of the standards required to warrant a hearing under *Hager* and conduct a discharge trial.

Dated this 25th day of May 2017

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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 7020 words, including certifications.

Dated this 25th day of May 2017

LEN KACHINSKY

CERTIFICATION REGARDING ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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 25th day of May 2017

LEN KACHINSKY