STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1311

In re the commitment of Howard Carter:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

HOWARD CARTER,

Respondent-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING ORDERS ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE KENDALL M. KELLEY, PRESIDING

BRIEF AND APPENDIX OF PETITIONER-RESPONDENT

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ISSUES PRESENTED

1. Was the attorney who represented Carter in connection with his petition for discharge from a commitment as a sexually violent person ineffective for agreeing that the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 apply retroactively to petitions filed before the effective date of the act?

The court of appeals held that counsel was not ineffective because the revisions are retroactive.

2. Do the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 violate a committed person's right to due process?

The court of appeals held that the revisions did not violate due process under its construction of the statute.

3. Should Carter be allowed to withdraw his concession that he is not entitled to a discharge trial under the current version of Wis. Stat. § 980.09?

The court of appeals accepted Carter's concession and declined to determine whether he is entitled to a discharge trial.

INTRODUCTION

This is a companion case to *State v. Hager*, Case No. 2015AP330, which is also presently pending before this Court. Both cases involve the revisions made by 2013 Wis. Act 84 to Wis. Stat. § 980.09, which deals with petitions for discharge filed by persons who have been committed as sexually violent.

In *Hager*, the State showed that the statute, as amended, should be construed to direct a court that is considering whether a committed person is entitled to a discharge trial to compare the new facts alleged in a petition

for discharge with the evidence presented at the most recent commitment or discharge trial to determine whether a trier of fact would likely conclude that the person's condition has sufficiently changed that the State can no longer prove that the person meets the criteria for commitment.

In this case the State will show that the revised procedure applies retroactively to petitions filed before the effective date of the legislation that made the changes. The State will also show that the revised procedure does not violate a committed person's right to substantive or procedural due process in determining whether he is entitled to a discharge trial.

ORAL ARGUMENT AND PUBLICATION

This Court ordinarily hears oral argument and publishes its opinions.

STATEMENT OF THE CASE

Statute Involved

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 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, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

. . . .

(2) In reviewing the petition, the court may hold a hearing to determine if the person's condition has

sufficiently changed such that a court or jury would likely conclude the person no longer meets the criteria for commitment as a sexually violent person. In determining under this subsection whether the person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court may consider the record, including evidence introduced at the initial commitment trial or the most recent trial on a petition for discharge, any current or past reports filed under section 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state. If the court determines that the record does not contain facts from which a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court shall deny the petition. If the court determines that the record contains facts from which a court or jury would likely conclude the person no longer meets the criteria for commitment, the court shall set the matter for trial.

Procedural History

The respondent-appellant-petitioner, Howard Carter, was convicted of third-degree sexual assault of a child, and sentenced to eight years in prison on September 6, 2002. (R. 2; 31.)

On February 5, 2009, Carter was committed as a sexually violent person. (R. 68; 69.) The order committing Carter was affirmed by the court of appeals on April 6, 2010. (R. 86.) Carter subsequently filed and withdrew several petitions for discharge. (R. 83; 96; 103; 110; 120; 126.) None of these petitions ever led to an evidentiary hearing or discharge trial.

On December 12, 2013, the Legislature enacted 2013 Wis. Act 84, which significantly changed the procedure for seeking discharge from a commitment as a sexually violent person. 2013 Wis. Sess. Laws 813. The law was published December 13, 2013. 2013 Wis. Sess. Laws 813. The same day the law was published, Carter filed the petition for discharge from his commitment as a sexually violent person that is the subject of this appeal. (R. 143.) 2013 Wis. Act 84 went into effect the next day. Wis. Stat. § 991.11.

In the proceedings in the circuit court, the attorney who represented Carter in connection with his discharge petition agreed that the change in the law applied retroactively to this pending case. (R. 194:6–7.) At a non-evidentiary hearing, the circuit court, considering the two most recent expert reports, one filed by Carter's expert, Dr. Lytton, and the other filed by the State's expert, Dr. Woodley, determined that Carter was not entitled to a discharge trial because he had not shown that it was likely that a trier of fact would find that he was no longer a sexually violent person. (R. 196:40, 53–54.)

Carter filed a post-commitment motion on December 30, 2014, claiming that his previous attorney was ineffective for agreeing that the revisions to section 980.09 applied retroactively, and for failing to raise any constitutional challenge to the discharge statute as revised. (R. 166.) The circuit court denied the motion in a written order, ruling that the revisions made by 2013 Wis. Act 84 applied retroactively to this case, that the revisions did not deny Carter due process, and that Carter's attorney was not ineffective. (R. 189, Pet-App. 114–31.) Carter appealed. (R. 190.)

While this appeal was pending, Carter was released on supervision. (R. 193.5.)

The court of appeals certified this case, along with *Hager*, to this Court on February 2, 2016. Certification was denied on April 4, 2016, and the court of appeals, after hearing oral argument, decided this case in an opinion that has been published. *State v. Carter*, 2017 WI App 9, 373 Wis. 2d 722, 892 N.W.2d 754. (Pet-App. 101–12.)

The court of appeals decided that the revisions made to section 980.09 that became effective the day after he filed his petition for discharge applied retroactively to him because they are procedural in nature, Carter had no vested right to a discharge trial, and complying with the new procedure did not unreasonably burden him. *Carter*, 373 Wis. 2d 722, ¶¶ 14–20. (Pet-App. 107–10.)

Referencing its contemporaneous decision in *State v. Hager*, 2017 WI App 8, 373 Wis. 2d 692, 892 N.W.2d 740 (review granted), the court repeated its holding that the amended version of the statute "does not allow, much less require, circuit courts to 'weigh' the evidence supporting the discharge petition against the evidence in opposition to it." *Carter*, 373 Wis. 2d 722, ¶ 20. (Pet-App. 110.) The court noted that the revisions accomplished a material increase in the burden a committed person must meet to get a discharge trial, but found that the new standard was neither unreasonably burdensome nor constitutionally suspect. *Carter*, 373 Wis. 2d 722, ¶ 20. (Pet-App. 110.)

Carter conceded in the court of appeals that he would not be entitled to a discharge trial if the new standards applied retroactively to him. *Carter*, 373 Wis. 2d 722, ¶ 21. (Pet-App. 111.) So the court of appeals did not consider the question of whether he was entitled to a trial. *Carter*, 373 Wis. 2d 722, ¶ 21. (Pet-App. 111.)

Because it concluded that the revisions to section 980.09 applied retroactively to Carter, the court of appeals

held that Carter's attorney was not ineffective for failing to object to their application. *Carter*, 373 Wis. 2d 722, ¶ 22. (Pet-App. 111–12.)

The court of appeals affirmed both the order denying Carter's discharge petition and the order denying his post-commitment motion. *Carter*, 373 Wis. 2d 722, ¶ 23. (Pet-App. 112.)

Carter filed a petition for review, which was granted by this Court.

SUMMARY OF ARGUMENTS

I. Carter's attorney was not ineffective for agreeing that the revisions made by 2013 Wis. Act 84 to Wis. Stat. § 980.09 apply retroactively. Section 980.09 is a procedural statute, prescribing the legal mechanism by which a committed person may obtain a discharge trial. Revisions to a procedural statute are presumed to be retroactive. The two exceptions to this rule do not apply in this case. Carter had no vested right to a discharge trial, and the revisions do not impose any unreasonable burden on him.

II. The revisions do not violate a committed person's right to due process. The revisions comport with the principles of substantive due process because they are rationally related to the State's legitimate interests in protecting the community from sexually dangerous persons and in promoting the efficiency of the judicial system. The revised procedure, which is similar to the procedure for getting a new trial on the basis of newly discovered evidence, serves the State's interests by more efficiently weeding out unmeritorious petitions than the previous procedure, and reserving trials for those who have a reasonable probability of prevailing.

The revisions similarly comply with the requirements of procedural due process because the State's legitimate interests in protecting the community from sexually dangerous persons and in promoting the efficiency of the judicial system can be accommodated without any serious risk of erroneously depriving Carter of his liberty.

STANDARDS OF REVIEW

On review of a claim of ineffective assistance of counsel, the circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶¶ 21, 24, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law that are determined independently. *Thiel*, 264 Wis. 2d 571, ¶¶ 23–24.

Whether a change in a statute has retroactive effect is a question of law that is determined independently. *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 15, 244 Wis. 2d 720, 628 N.W.2d 842.

Whether a statute is constitutional is a question of law that is determined independently, as are included questions regarding the allocation of the burden of proof. *State v. West*, 2011 WI 83, ¶¶ 21–22, 336 Wis. 2d 578, 800 N.W.2d 929.

Whether a party should be allowed to withdraw a concession is within the discretion of the court. *Burmeister v. Vondrachek*, 86 Wis. 2d 650, 664, 273 N.W.2d 242 (1979).

ARGUMENT

I. Carter failed to prove that the attorney who represented him in connection with his petition for discharge from a commitment as a sexually violent person was ineffective for agreeing that the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 apply retroactively to petitions filed before the effective date of the act because the revisions are retroactive.

By agreeing that the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 apply retroactively to petitions for discharge from a commitment as a sexually violent person filed before the effective date of the act, Carter's attorney forfeited any right to argue that these revisions are not retroactively applicable to the petition filed by Carter. *See State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511; *State v. Nielsen*, 2001 WI App 192, ¶ 11, 247 Wis. 2d 466, 634 N.W.2d 325.

A defendant must bear the risk of an alleged attorney error that results in a procedural default unless the performance of his attorney was constitutionally ineffective. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Therefore, a waiver can be circumvented by a claim that counsel provided ineffective assistance. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 680 n.5, 556 N.W.2d 136 (Ct. App. 1996). This means that a waived error, even a constitutional error, is not reviewed directly, but is analyzed under the standards for determining whether counsel was ineffective. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31.

A criminal defendant who claims that his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient

performance prejudiced his defense. *Thiel*, 264 Wis. 2d 571, ¶ 18. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719.

A. Carter's attorney did not perform deficiently by agreeing that the new revisions apply retroactively to this case since a reasonable attorney could conclude that the revisions are retroactive.

To prove that his attorney performed deficiently, a defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19. There is a range of reasonableness, *Chen v. Warner*, 2005 WI 55, ¶ 37 n.24, 280 Wis. 2d 344, 695 N.W.2d 758, permitting different people to reasonably make different decisions in the same circumstances. *State v. St. George*, 2002 WI 50, ¶ 58, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Robinson*, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988).

To be reasonable is not to be perfect, so a decision can be perfectly reasonable even though it may be mistaken. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014); *State v. Houghton*, 2015 WI 79, ¶ 44, 364 Wis. 2d 234, 868 N.W.2d 143. Thus, the test for ineffective assistance of counsel does not assess the legal correctness of counsel's judgments, but the reasonableness of those judgments under the circumstances of the case. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from

counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583. From this perspective, an attorney is not ineffective for making what in retrospect might appear to be an error of judgment on law that is unsettled. *State v. Van Buren*, 2008 WI App 26, ¶¶ 18–19, 307 Wis. 2d 447, 746 N.W.2d 545; *Maloney*, 281 Wis. 2d 595, ¶ 23.

That the law remains unsettled to this day is illustrated by the fact that this Court granted review of this case to authoritatively decide the question of whether 2013 Wis. Act 84 applies retroactively. So Carter's attorney did not perform deficiently, even if he might have been wrong about the retroactivity of the revisions, as long as any error was not unreasonable.

But counsel was not wrong. His conclusion that the revisions to the statute relating to discharge petitions are retroactive was not just reasonable, it was right. Both the circuit court (R. 189:11, Pet-App. 124) and the court of appeals, *Carter*, 373 Wis. 2d 722, ¶ 22 (Pet-App. 111), determined that the revisions apply retroactively to the petition filed in this case.

The rules regarding the retroactivity of statutes were comprehensively considered in *Trinity Petroleum, Inc. v. Scott Oil Co., Inc.*, 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1. *See also Kroner v. Oneida Seven Generations Corp.*, 2012 WI 88, ¶¶ 26–27, 33, 342 Wis. 2d 626, 819 N.W.2d 264 (reaffirming the *Trinity Petroleum* analysis).

Although, as a general rule, substantive statutes apply prospectively, a statute that is procedural or remedial rather than substantive is presumed to have retroactive application. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 40, 80 & n.24. A statute is substantive when it creates, defines or

regulates rights or obligations. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 41. A statute is procedural when it prescribes the method, manner or mode of conducting legal proceedings to enforce those rights or duties. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 41.

Wisconsin Statute § 980.09 is a procedural statute. It prescribes the legal mechanisms by which a committed person may obtain a discharge trial. *See City of Madison v. Town of Madison*, 127 Wis. 2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985). It creates a process for weeding out meritless and unsupported petitions for discharge while still protecting a committed person's access to a discharge trial. *State v. Arends*, 2010 WI 46, ¶ 22, 325 Wis. 2d 1, 784 N.W.2d 513. In this respect it is very much like the statute recognized as procedural in *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 47.

In the companion case to this one, *State v. Hager*, the court of appeals correctly recognized that section 980.09 was revised to increase the petitioning person's burden of production. While before it was sufficient to allege facts from which a trier of fact "may conclude" that the committed person would prevail at a trial, now there must be facts from which a trier of fact "would likely conclude" that he would prevail. *Hager*, 373 Wis. 2d 692, ¶ 28. (Pet-App. 144–45.)

The Legislature also made other changes to the statute. The Legislature altered the "lookback period" to the most recent evidentiary hearing on the merits. *Hager*, 373 Wis. 2d 692, ¶ 28. (Pet-App. 145.) The focus of the review shifted from the contents of the petition to the contents of the record. *Hager*, 373 Wis. 2d 692, ¶ 29. (Pet-App. 145–46.) The record now includes the evidence at the most recent hearing where the committed person was found to be sexually violent. *Hager*, 373 Wis. 2d 692, ¶ 29. (Pet-App. 145–46.) These revisions are all procedural, designed to

change the method, manner or mode of conducting legal proceedings to enforce a committed person's right to a discharge if he no longer meets the criteria for commitment.

A procedural statute will not be given retroactive effect if it disturbs a vested right other than in a matter of procedure. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 53. A litigant has no vested right to any particular procedure. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 48, 62. The vested right must be a substantive right, such as a right to assert a cause of action. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 57–58, 60. A right to petition a court for a modification of a court order is a substantive right. *See Schulz v. Ystad*, 155 Wis. 2d 574, 597–98, 456 N.W.2d 312 (1990).

A change in a procedural rule that merely alters the burden of production does not impair a person's right to assert a cause of action by petitioning for discharge from a sexually violent person commitment. A sexually violent person is still entitled to bring a petition for discharge at any time. Wis. Stat. § 980.09(1). The person is still entitled to a trial if he makes the required preliminary showing. Wis. Stat. § 980.09(1), (2). The person is still entitled to discharge if the State fails to prove at a trial that he is still sexually violent. Wis. Stat. § 980.09(3), (4).

In any event, the right to a trial on a petition for discharge is not a vested right. A right that is contingent on an uncertain future event is not vested. *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 50 & n.17, 370 Wis. 2d 500, 881 N.W.2d 702. A committed person has a right to a discharge trial only under appropriate circumstances. *See State v. Richard*, 2014 WI App 28, ¶ 17, 353 Wis. 2d 219, 844 N.W.2d 370. Until a court makes a finding that the committed person has alleged facts that would entitle him to a trial, no right to any trial accrues. *See Trinity Petroleum*, 302 Wis. 2d 299, ¶ 62.

Finally, a procedural statute will not be given retroactive effect if it imposes an unreasonable burden on a party attempting to comply with the new procedural requirements. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 53. In a situation like the one in this case where a pleading was filed before the effective date of the new rule but was not litigated until after the effective date, the question is whether the parties were given adequate notice of the new procedural rule, and could have tailored the way they litigated the case so as to comply with it. *See Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 59, 72.

Here, the new revisions became law the day before Carter's discharge petition was filed, and became effective the day after the filing, 2013 Wis. Sess. Laws 813, *see* Wis. Stat. § 991.11, so that they were in force for all but one day that the proceedings in this case were pending. Here, all the parties were aware of the new procedure before the commencement of the first court proceeding on the petition. (R. 194:4–7.) The court of appeals noted the change in a published opinion decided a couple weeks later, before any other events occurred. *Richard*, 353 Wis. 2d 219, ¶ 12 n.9. Therefore, this case easily could have been, and was, litigated under the new procedure.

Contrary to what Carter contends (Carter's Br. 15), the State has never suggested that the revisions made by Act 84 would apply retroactively when a petition had passed both stages of scrutiny, as discussed by *Arends*, before the effective date of the revisions. If a court had already determined that a committed person was entitled to a discharge trial under the rules in effect at the time of that determination, there would be no occasion to retroactively apply the new standards for determining whether a discharge trial was warranted. But that is not this case.

Carter argues that because a sexually violent person is deprived of his liberty by a civil commitment, there must be "mechanisms for periodic review and access to a hearing." (Carter's Br. 17.) But those mechanisms continue to be provided by section 980.09. The new mechanisms might make it more difficult to get a discharge trial, but Carter cites no authority for the proposition that simply increasing the burden he must meet to get a trial prohibits retroactivity if he is able to follow the new procedures in seeking relief. *See Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 59, 72. *Cf. California Dep't of Corr. v. Morales*, 514 U.S. 499 (1995) (a statutory change that alters the method for obtaining a parole hearing which makes it more difficult to get a hearing is not an ex post facto law).

Carter makes reference to his argument that section 980.09 would be unconstitutional if it required weighing evidence favoring discharge against evidence favoring continued commitment. (Carter's Br. 17, 21.) But that has nothing to do with the issue of retroactivity since if the statute is unconstitutional, it cannot be applied at all, retrospectively or prospectively. Besides, the court of appeals has expressly held that the revisions to the statute do not permit or require weighing, *Hager*, 373 Wis. 2d 692, ¶¶ 35, 37 (Pet-App. 148–49), and the State has not disagreed with that ruling in this Court. (State's *Hager* Br. 20, R-App. 125.)

Carter failed to prove that his attorney performed deficiently since it was perfectly reasonable for counsel to conclude, correctly as it turns out, that the new procedural rules created by 2013 Wis. Act 84 apply retroactively to this case.

B. Carter failed to prove that he was prejudiced by his attorney's agreement that the new rule applied retroactively to this case because it does apply retroactively.

Because Carter failed to prove that his attorney performed deficiently by agreeing that the new standard of proof applies retroactively to this case, Carter's claim of ineffective assistance fails, and there is no need to inquire whether he was prejudiced by his attorney's performance because he would have been entitled to a trial under the old standard. *Williams*, 296 Wis. 2d 834, ¶ 18; *Thiel*, 264 Wis. 2d 571, ¶ 18.

In any event, Carter cannot prove prejudice because the conclusion that the new burden of production applies to this case is not just reasonable, it is correct. For the reasons discussed above, the new standard does apply retroactively to this and other petitions for discharge filed before the date 2013 Wis. Act 84 became effective.

II. The revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 do not violate a committed person's constitutional right to due process.

A statute may be challenged as unconstitutional either on its face or as applied. *Tammy W.G. v. Jacob T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854. A facial constitutional challenge attacks the law itself, claiming it is unconstitutional from beginning to end, and cannot be constitutionally applied under any circumstances. *Tammy W.G.*, 333 Wis. 2d 273, ¶ 46; *Society Ins. v. LIRC*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444, 786 N.W.2d 385. It is apparent from the nature of Carter's argument that he is challenging Wis. Stat. § 980.09, as amended by 2013 Wis. Act 84, on its face.

Because a facial challenge to a statute implicates a question of subject matter jurisdiction, the issue cannot be waived by failing to timely raise it in previous proceedings. *State v. Bush*, 2005 WI 103, ¶¶ 15–19, 283 Wis. 2d 90, 699 N.W.2d 80. Therefore, the issue is considered directly and not as a question of ineffective assistance of counsel for not raising it previously.

On a facial challenge, it is presumed that statutes, including those with retroactive effect, are constitutional. *Tammy W.G.*, 333 Wis. 2d 273, ¶ 46; *Society Ins.*, 326 Wis. 2d 444, ¶ 26. The challenger has a heavy burden to overcome this presumption. *Tammy W.G.*, 333 Wis. 2d 273, ¶ 46. He must establish beyond a reasonable doubt that the statute is unconstitutional in all its applications, and that there is no situation where the law would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *State v. Pocian*, 2012 WI App 58, ¶ 6, 341 Wis. 2d 380, 814 N.W.2d 894. *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶¶ 16–18, 279 Wis. 2d 169, 694 N.W.2d 344; *State v. Cole*, 2003 WI 112, ¶¶ 11, 17, 264 Wis. 2d 520, 665 N.W.2d 328 (and cases cited). A court must indulge every presumption and resolve every doubt in favor of sustaining the law. *Ponn P.*, 279 Wis. 2d 169, ¶ 17; *Cole*, 264 Wis. 2d 520, ¶ 11.

A. The revised statute comports with the principles of substantive due process.

Civil commitment of a sexually violent person, which deprives him of his liberty, is subject to the requirements of due process. *State v. Rachel*, 2002 WI 81, ¶ 61, 254 Wis. 2d 215, 647 N.W.2d 762.

A committed person has a fundamental right to freedom from physical restraint. *Rachel*, 254 Wis. 2d 215, ¶ 61. But the State has a compelling competing interest in protecting the community from sexually violent persons who

are at a high risk to reoffend by depriving them of their liberty. *West*, 336 Wis. 2d 578, ¶ 32; *Rachel*, 254 Wis. 2d 215, ¶ 64. Ensuring the fair treatment of all litigants, avoiding the disruption of litigation, and preserving judicial resources are also legitimate government interests. *State v. Alger*, 2015 WI 3, ¶ 55, 360 Wis. 2d 193, 858 N.W.2d 346.

Substantive due process demands a balance between a committed person's interest in liberty and the public's right to protection from the danger posed by persons who have demonstrated their propensity to perpetrate sexually violent acts. *State v. Post*, 197 Wis. 2d 279, 317, 541 N.W.2d 115 (1995). Commitment of a sexually violent person does not violate substantive due process when the nature and duration of the commitment are reasonably related to the State's compelling interest in protection from sexually violent persons who are in need of treatment. *West*, 336 Wis. 2d 578, ¶ 32.

When, as here, the issue involves, not the commitment itself, but the procedures used to determine whether and how long a sexually violent person should be committed, the rational basis test is used to assess whether a proper balance has been struck. *Alger*, 360 Wis. 2d 193, ¶¶ 43, 49.

A substantive due process claim is analyzed under the rational basis test unless the challenged legislation implicates a fundamental right or discriminates against a protected class. *Alger*, 360 Wis. 2d 193, ¶¶ 39, 46. Sexually violent persons are not a protected class. *Westerheide v. State*, 831 So.2d 93, 111 (Fla. 2002). And the procedures available for a trial in a civil commitment proceeding do not implicate a fundamental right. *Alger*, 360 Wis. 2d 193, ¶¶ 43–44. *See Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 57–62.

Under a rational basis review, legislation will be upheld unless it is patently arbitrary and has no rational

relationship to a legitimate government interest. *Alger*, 360 Wis. 2d 193, ¶ 39. This deferential test is satisfied if any reasonably conceivable state of facts could provide a rational basis for the law, regardless of whether the legislation was actually based on that reason. *Alger*, 360 Wis. 2d 193, ¶ 50. The party attacking the statute has the burden to prove beyond a reasonable doubt that there is no rational basis for the change in the procedures made by 2013 Wis. Act 84. *See Alger*, 360 Wis. 2d 193, ¶ 50. *See also Ponn P.*, 279 Wis. 2d 169, ¶ 16–18; *Cole*, 264 Wis. 2d 520, ¶¶ 11, 17.

The Legislature could have reasonably determined that the procedure in place prior to 2013 made it too easy to get a discharge trial on a very slim or practically nonexistent chance of actually being entitled to a discharge. The Legislature could have determined that it needed to tighten up the procedure to give the courts a more efficient way to weed out unmeritorious or marginal petitions, and to save them from having to go through the motions of holding numerous trials that would be just be a waste of time and resources at best, or at worst could result in the erroneous discharge of a sexually violent person who was still dangerous. *See* Wisconsin Legislative Council, *Joint Legislative Council's Report of the Special Committee on Supervised Release and Discharge of Sexually Violent Persons*, JLCR 2013-03 (Feb. 19, 2013).

As discussed in more detail in the State's opening brief in *Hager*, the old procedure, while it was intended to weed out unmeritorious or marginal petitions for discharge, *Arends*, 325 Wis. 2d 1, ¶ 22, was not very effective in accomplishing that task.

The statute formerly provided that a committed person was entitled to a discharge trial if "the petition alleges facts from which the court or jury *may conclude* . . . that the person does not meet the criteria for commitment as

a sexually violent person." Wis. Stat. § 980.09 (2011–12) (emphasis added). Under that standard, a committed person had to show only that it was possible that a trier of fact could find in his favor. *Hager*, 373 Wis. 2d 692, ¶ 2. (Pet-App. 133.)

Moreover, in assessing whether a discharge trial should be held, a court could consider only evidence favorable to the committed person. *Arends*, 325 Wis. 2d 1, ¶ 40. If the petition alleged sufficient facts to show that it was not simply frivolous, the court considered whether the allegations in the petition were supported by facts on which a trier of fact could reasonably rely that could support a decision for the committed person at a discharge trial. *Arends*, 325 Wis. 2d 1, ¶¶ 38–39. A court was required to conduct a discharge trial if the petition for discharge alleged any facts favorable to the person seeking discharge that could possibly support a finding in favor of the committed person. *Arends*, 325 Wis. 2d 1, ¶¶ 41–43.

A sexually violent person like Howard Carter could just toot and come on in for a trial at any time, time after time, *see* Wis. Stat. § 980.09(1), even when it was unlikely that a trier of fact would ever properly decide in his favor, just by showing that it was minimally possible that a trier of fact might decide in his favor. So a person could file repeated petitions for discharge and repeatedly get potentially lengthy trials featuring debates by expensive expert witnesses, putting undue pressure on the judicial system, and risking the erroneous release of a dangerous person if a jury was mistaken about the facts or misapplied the law.

The Legislature made several significant revisions to Wis. Stat. § 980.09 in 2013 Wis. Act 84, changing not only a committed person's burden of production, but also the way a court determines whether that increased burden has been met. The burden of production was increased from "may

conclude" to "would likely conclude." *Hager*, 373 Wis. 2d 692, ¶ 28. (Pet-App. 144–45.) The Legislature altered the "lookback period" to the most recent evidentiary hearing on the merits. *Hager*, 373 Wis. 2d 692, ¶ 28. (Pet-App. 145.) The focus of the review shifted from the contents of the petition to the contents of the record, which now includes the evidence at the most recent hearing where the committed person was found to be sexually violent. *Hager*, 373 Wis. 2d 692, ¶ 29. (Pet-App. 145–46.) The Legislature also changed the statute in a way that did not change the law by codifying the rule articulated in previous court cases that a petition for discharge must be based on new facts not previously considered in any other evidentiary hearing on the merits. *Hager*, 373 Wis. 2d 692, ¶¶ 40–41. (Pet-App. 151–52.)

As discussed in the State's *Hager* brief, the statutory changes place new emphasis on new evidence showing a sufficient change in a committed person's condition since the evidence presented at the last evidentiary hearing proved that he was sexually violent. Now, the statute directs a court to compare the new evidence with the evidence presented previously to determine whether the result of a new trial would likely be different from the result of the previous trial. Thus, under the recent revisions to Wis. Stat. § 980.09(2), the matters that a committed person must establish to get a trial on a petition for discharge are substantially similar in at least two ways to the matters an incarcerated person must establish to get a new criminal trial on the basis of newly discovered evidence.

First, in both situations, the evidence must be "new." A criminal defendant who seeks a new trial on the basis of evidence not presented at the trial resulting in his conviction must show that he has new evidence that was discovered after his conviction. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶ 43,

284 Wis. 2d 111, 700 N.W.2d 62. Although a committed person seeking a new discharge trial does not have to show that he has evidence that was newly discovered since his previous trial, he has an analogous burden of production. He has to show that he has new evidence that was not introduced at a previous commitment or discharge trial. *State v. Schulpius*, 2012 WI App 134, ¶ 35, 345 Wis. 2d 351, 825 N.W.2d 311. This new evidence may be newly discovered evidence or it may be previously known evidence, but it must be "new" in the sense of being newly presented or used.

Second, in both situations, there must be a reasonable probability of a different outcome. A criminal defendant who establishes that he has newly discovered evidence is entitled to a new trial only if he shows that there is a reasonable probability that the result of a new trial would be different from the result of his past trial. *Plude*, 310 Wis. 2d 28, ¶¶ 32–33; *Love*, 284 Wis. 2d 111, ¶¶ 43–44. In other words, it must be reasonably probable that a jury, looking at the evidence available when the defendant was convicted and the new evidence available to the defendant, would find that the new evidence changes the factual picture so significantly that it would now have a reasonable doubt about the defendant's guilt. *Plude*, 310 Wis. 2d 28, ¶¶ 32–33; *Love*, 284 Wis. 2d 111, ¶¶ 43–44.

The reviewing court is not permitted to weigh the evidence favoring a different result against evidence indicating that the result would be the same. *State v. Edmunds*, 2008 WI App 33, ¶ 18, 308 Wis. 2d 374, 746 N.W.2d 590. Rather, the court must compare the new evidence with the old evidence to assess how a jury would probably decide a new trial with the new evidence in addition to the evidence they heard previously.

Similarly, a committed sexually violent person now must show that a trier of fact, if it heard the new evidence,

would likely reach a different result from the one reached at the last trial. The person must show that a trier of fact, looking at the evidence available when the person was committed or not discharged, and the new evidence now available to the person, would find that the new evidence changes the factual picture so significantly that it would have a consequential doubt about whether the person was still sexually violent.

Again, the reviewing court does not weigh any competing evidence. Rather, it must compare the new evidence with the previous evidence to assess whether it is likely that a trier of fact would reach a different result at a new trial.

Although section 980.09(2) literally states that the question is whether the trier of fact would likely conclude that the committed person "no longer meets the criteria for commitment," this language considered in context to reach a reasonable result requires the committed person to show that at a new trial a trier of fact would likely find that the State failed to meet its burden to prove that he is still a sexually violent person. This is akin to the burden in a newly discovered evidence case to show that at a new trial the State would probably fail to meet its burden to prove that the defendant is guilty beyond a reasonable doubt.

Hence, the statute requires the committed person to show that the result of a new discharge trial would likely be different from the result of the last one. This procedure better serves the Legislature's statutory purpose of "weeding out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *Arends*, 325 Wis. 2d 1, ¶ 22. A committed person should get a new discharge trial if he shows that there is some practical reason to actually go through the motions of holding a new trial that is not simply going to be a remake of a trial that

has already been held, or will result in the discharge of a person who should still be committed.

As this Court has observed, the Legislature has amended Wis. Stat. ch. 980 several times since it was first enacted, and each time has increasingly demonstrated its concern for the protection of the public by limiting the ability of a committed person to obtain release. *State v. Gilbert*, 2012 WI 72, ¶ 24, 342 Wis. 2d 82, 816 N.W.2d 215; *West*, 336 Wis. 2d 578, ¶ 42. The latest revisions continue this trend, making a discharge trial available only when there is a legitimate reason to believe that the condition of a person who has been found to be sexually violent has actually changed so that he is genuinely no longer dangerous.

The Legislature had every right to change the requirements for getting a full evidentiary hearing to insure that persons who are committed because they are sexually violent do not abuse the system. *State v. McCuistion*, 275 P.3d 1092, 1102 (Wash. 2012). "'[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.'" *Gilbert*, 342 Wis. 2d 82, ¶ 25 (quoting *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 30, 262 Wis. 2d 720, 665 N.W.2d 155).

Carter does not expressly engage in any substantive due process analysis. He erroneously asserts that the procedural revisions in the discharge statute should be subject to strict scrutiny, followed by an assertion that the increased restrictions on getting a discharge trial were not required by the State's interests in treatment of the patient and protection of the public. (Carter's Br. 22, 26.) However, the inquiry is not whether the revisions were required, but whether they were rational. Carter does not address that question.

Because the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 are reasonable and have a rational relation to the State's legitimate interest in protecting the public from dangerous repeat sex offenders, they fully comport with the principles of substantive due process. *See generally Alger*, 360 Wis. 2d 193, ¶ 39.

B. The revised statute complies with the requirements of procedural due process.

The requirements of procedural due process may vary depending on the situation. *State v. Kaminski*, 2009 WI App 175, ¶ 13, 322 Wis. 2d 653, 777 N.W.2d 654. Whether a particular procedure satisfies the requirements of due process depends on a balance of the private interest involved, the public interests involved, and the risk of an erroneous deprivation of those interests. *Kaminski*, 322 Wis. 2d 653, ¶ 13; *State v. Beyer*, 2006 WI 2, ¶ 20 & n.27, 287 Wis. 2d 1, 707 N.W.2d 509.

As discussed above, a committed person has a fundamental right to liberty. *Rachel*, 254 Wis. 2d 215, ¶ 61. But the State has a compelling interest in protecting the public by depriving sexually violent persons of their liberty. *West*, 336 Wis. 2d 578, ¶ 32; *Rachel*, 254 Wis. 2d 215, ¶ 64.

Efficient judicial administration is also a legitimate government interest. *Alger*, 360 Wis. 2d 193, ¶ 55. In considering what process is due, this includes the fiscal and administrative burdens that some procedures would entail. *Kaminski*, 322 Wis. 2d 653, ¶ 13; *Beyer*, 287 Wis. 2d 1, ¶ 20 n.27. The State has a substantial interest in avoiding the significant fiscal and administrative burdens associated with evidentiary hearings to determine whether a sexually violent person should be discharged. *McCuistion*, 275 P.3d at 1104. This interest is especially strong when a new trial would serve no useful purpose because it is unlikely that the

result would be any different from the result of a previous commitment or discharge trial.

The procedural revisions to section 980.09 suitably serve the State's interests in public protection and judicial efficiency by working to insure that there will be a new discharge trial only when there is a reasonable chance that a reasonable result will be different from the result of a previous commitment or discharge trial. *See State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999) (scarce judicial resources are conserved by requiring a showing that the relief sought may be warranted). The State's resources will not be wasted on trials that are merely remakes of older courtroom dramas with different actors playing the same roles with only inconsequential changes in the script.

The procedural revisions to section 980.09 present no significant risk of an erroneous deprivation of a committed person's interest in liberty, while making it less likely that the State's legitimate interests will be ignored.

Due process is not violated simply by restricting a committed person's access to discharge. *See West*, 336 Wis. 2d 578, ¶ 47; *Rachel*, 254 Wis. 2d 215, ¶ 66. This access may be restricted by requiring a committed person to show that he has a reasonable probability of succeeding at a discharge trial.

Established practice requires any litigant who wants an evidentiary hearing to raise a question of fact which, if resolved in his favor, would entitle him to relief. *Velez*, 224 Wis. 2d at 10–12. A defendant who brings a motion for postconviction relief is not entitled to an evidentiary hearing if the motion fails to allege facts sufficient to warrant relief, or if the record conclusively shows that the defendant is not entitled to relief even if the facts alleged in the motion would otherwise be sufficient. *State v. Balliette*, 2011 WI 79, ¶¶ 18,

50, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 2004 WI 106, ¶ 15, 274 Wis. 2d 568, 682 N.W.2d 433. Thus, it is common practice to compare the facts alleged by the person seeking a hearing with the facts already in the record to determine whether a hearing will be held.

Even when the State would have the ultimate burden of persuasion at the evidentiary hearing, considering whether the person seeking the hearing has placed into issue a question of fact that could lead to relief is consistent with the person's right to due process. *Velez*, 224 Wis. 2d at 15. Requiring the person to put forward some facts which, if proved, would entitle him to relief does not shift the State's ultimate burden of persuasion. *Velez*, 224 Wis. 2d at 15. This requirement imposes only a burden of production. *See Velez*, 224 Wis. 2d at 15–16. "The principles of due process are not violated if the burden of production, as opposed to the burden of persuasion, is placed upon a defendant." *Velez*, 224 Wis. 2d at 16–17.

So when a sexually violent person seeks a discharge trial, "it is not unduly burdensome to provide a 'gatekeeper' to ensure that only those who can make a legitimate claim can obtain a jury trial." *In re Coffman*, 225 S.W.3d 439, 444 (Mo. 2007).

The recent revisions to section 980.09 fashion a procedure that adapts to petitions for discharge the longstanding and familiar requirements for obtaining a new trial based on newly discovered evidence. The committed person must have new evidence not presented at any previous commitment or discharge trial showing that his condition has changed. The person must show that it is likely that a trier of fact, comparing the new evidence with the evidence presented at the most recent commitment or discharge trial, would now have a consequential doubt about whether he continues to meet the criteria for commitment as

a sexually violent person so that the result of a new trial would be different from the results of previous trials.

This completely proper procedure presents little if any risk of an erroneous deprivation of a committed person's interest in liberty. A committed person is not erroneously deprived of his freedom by denying him a discharge trial when he cannot show that there is any reason to have a discharge trial because he would not be able to show that there is even a consequential doubt about whether he continues to be a sexually violent person who can properly be deprived of his liberty.

Balancing a committed person's interest in liberty, the low risk of an erroneous deprivation of that interest, the State's interest in the protection of the public, and the State's interest in judicial efficiency, the revised procedures for obtaining a discharge trial do not deprive a committed person of procedural due process. *Cf. McCuistion*, 275 P.3d at 1105.

The heading to Carter's due process argument shows that his contentions are wrapped up in the supposition that the revised procedures would be unconstitutional "if" present section 980.09 was "read to allow weighing." (Carter's Br. 21.)

But the court of appeals held in *Hager* and repeated in this case that the discharge statute does not allow a court to weigh the evidence favoring discharge against the evidence in favor of commitment. *Hager*, 373 Wis. 2d 692, ¶ 43 (Pet-App. 153); *Carter*, 373 Wis. 2d 722, ¶ 20 (Pet-App. 110). In the brief filed in this Court in *Hager*, the State declined to contest the conclusion of the court of appeals that courts are not permitted to weigh the evidence. (State's Br. in *Hager* 17, 19, R-App. 122, 124.) The State has never taken a

contrary position in this case. Therefore, the foundation for Carter's pyramid crumbles.

Carter complains that the revised statute requires a committed person to show that a trier of fact would likely conclude that he was no longer a sexually violent person. (Carter's Br. 27.)

But under a proper interpretation of section 980.09, as revised, a committed person must show only that the State would not likely be able to meet its burden to prove that he continued to meet the criteria for commitment because a trier of fact would likely have a consequential doubt about whether he continued to be a sexually violent person. Carter cites no authority that imposing this burden of production on a committed person poses any due process problem.

Carter complains that under the revisions, conflicting expert opinions or new research about a person's condition would no longer be sufficient to warrant a new trial. (Carter's Br. 27.)

But under the proper methodology, a new opinion or new research would be sufficient to get a new discharge trial if a trier of fact, looking at the new evidence and the evidence presented at a previous commitment or discharge trial, would likely reach a different result than it did previously.

Carter appears to argue that it violates due process to apply statutory revisions that make it harder to get a discharge trial to a person who was committed before the changes went into effect. (Carter's Br. 28.)

If Carter means to reprise his first argument about retroactivity under a new constitutional rubric, it fares no better than it did before. Applying established procedural rules regarding retroactivity is due process.

If Carter means to complain that the increase in his burden of production violates due process, the court of appeals held that it did not. *Carter*, 373 Wis. 2d 722, ¶ 20. (Pet-App. 110.) At least one other court expressly agrees. *Coffman*, 225 S.W.3d at 444. *See Rachel*, 254 Wis. 2d 215, ¶ 66 (the mere limitation of a committed person's access to supervised release does not violate due process). *Cf. Morales*, 514 U.S. 499 (a statutory change that alters the method for obtaining a parole hearing which makes it more difficult to get a hearing is not an ex post facto law). Carter cites no authority to the contrary.

Finally, Carter finds it difficult to conceive how he can meet his burden to get a trial if he has to show that he is likely to win at a trial. (Carter's Br. 30.)

But the point of the legislative revisions to section 980.09, consistent with established judicial practice, is that there is no sound reason to give a committed person a discharge trial unless there is a reasonable probability that he can prevail at the trial. A committed person is not unconstitutionally deprived of his liberty by declining to give him a trial that would not likely result in giving him his liberty.

The recent revisions in the procedure for obtaining a discharge trial made by 2013 Wis. Act 84 fully comply with the requirements of procedural due process.

III. Carter should be allowed to withdraw his concession that he is not entitled to a discharge trial under the current version of Wis. Stat. § 980.09.

A party may be permitted to withdraw a concession when that concession was induced by misunderstanding or mistake, or when it is rendered inequitable by the

development of a new situation. *See Burmeister*, 86 Wis. 2d at 664; Wis. Stat. § 806.07(1).

It appears that Carter's concession that he is not entitled to a discharge trial under the current version of Wis. Stat. § 980.09 was based on his mistaken belief that the statute now requires weighing the evidence in favor of discharge against the evidence favoring continued commitment. *See Carter*, 373 Wis. 2d 722, ¶¶ 19–21. (Pet-App. 109–11.) Although Carter does not expressly withdraw his concession, he disentombs his contention that he meets the test for getting a discharge trial under the decision of the court of appeals in *Hager*. (Carter's Br. 13.)

However, the State has demonstrated that the decision of the court of appeals in *Hager* was wrong. The legislative revisions to section 980.09 went beyond merely increasing a committed person's burden of production, and fundamentally changed the procedure for obtaining a discharge trial. In particular, the old practice of looking only at the evidence favoring a trial was discarded and replaced by a new directive to look not only at the committed person's new evidence, but also at the evidence presented at the most recent commitment or discharge trial.

No court has ever considered whether Carter is entitled to a discharge trial under the present version of section 980.09 as it has actually been revised. In a similar situation in *Hager*, the State conceded that the case should be remanded to the circuit court for a determination of whether a discharge trial was warranted under the new procedure as properly understood. (State's *Hager* Br. 22–23, R-App. 127–28.) Therefore, the State agrees with Carter's request to remand his case to the circuit court for that purpose. (Carter's Br. 13.)

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals should be affirmed insofar as it held that the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84 apply retroactively to petitions for discharge filed before the effective date of the act, and that these revisions do not violate due process. However, the decision should be reversed insofar as it affirmed the orders of the circuit court that denied Carter a discharge trial. The case should be remanded to the circuit court for a determination of whether a discharge trial is warranted under the new procedure as properly understood.

Dated this 12th day of July, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,959 words.

Dated this 12th day of July, 2017.

_____
THOMAS J. BALISTRERI
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 12th day of July, 2017.

_____
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