

STATE OF WISCONSIN
IN SUPREME COURT

RECEIVED

07-24-2017

**CLERK OF SUPREME COURT
OF WISCONSIN**

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

HOWARD CARTER'S REPLY BRIEF

KACHINSKY LAW OFFICES

By: Len Kachinsky

State Bar No. 01018347

832 Neff Court

Neenah, WI 54956-2031

Phone: (920) 841-6706

Fax: (775) 845-7965

E-Mail: LKachinsky@core.com

Attorneys for the
Respondent-Appellant-Petitioner

TABLE OF CONTENTS

ISSUES PRESENTED.....	1
STATEMENT OF THE CASE	3
ARGUMENT.....	3
I. 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.....	3
A. <u>Standard of Review</u>	3
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>	3
II. IF 2013 ACT 84 APPLIED TO THIS CASE, IT WAS UNCONSTITUTIONAL BECAUSE IT UNDULY RESTRICTED ACCESS TO THE COURTS FOR PERSONS COMMITTED UNDER CHAPTER 980 SEEKING TO TERMINATE THEIR COMMITMENT.....	4
III. CARTER AGREES THAT A REMAND TO RE-EVALUATE CARTER’S RIGHT TO A DISCHARGE TRIAL WOULD BE APPROPRIATE.....	5
CONCLUSION ..	6

CASES CITED

<i>State v. Arends</i> , 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513.....	7
<i>State v. Howard Carter</i> , 2017 WI App 9, 373 Wis. 2d 722, 892 N.W.2d 754.	5

State v. Hager, 2017 App. 8, 373 Wis.2d 692, 892 N.W.2d 740.....2, *passim*

WISCONSIN STATUTES CITED

Sec. 809.19(8)(b) and (c).	8
Sec. 809.19(12).	8
Sec. 940.225(3).	3
Sec. 980.09.	6

OTHER AUTHORITIES CITED

2013 Act 84.	1, <i>passim</i>
----------------------	------------------

STATE OF WISCONSIN
IN SUPREME COURT

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

HOWARD CARTER'S REPLY 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 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.

III. IF 2013 ACT 84 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 Carter's first brief (App. 132-156).

STATEMENT OF THE CASE

The State erroneously stated (p. 3 of State's brief) that Carter was convicted of "third degree sexual assault of a child." The conviction was for third degree sexual assault contrary to Sec. 940.225(3), Wis. Stats. (1:1).

ARGUMENT

I. 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 State and Carter agree that the appropriate standard of review is *de novo*. (p. 9 of State's brief).

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

Carter believes that the arguments he made on this issue in his brief-in-chief sufficiently address most of those raised by the State (State's brief pages 8-15). Carter would disagree with the assertion on p. 10 of the State's brief that the failure of Attorney Pangburn to object to retroactive

application was reasonable due to the novel nature of the issue. Pangburn was aware of the change during proceedings on the discharge petition and had the opportunity to object. If sustained, the objection would have made it more likely that Carter's petition would be set for trial (194: 6, 18). A prudent attorney, knowing the unsettled issue, would have objected to preserve the issue for appeal.

On the substantive issue of retroactivity itself, Carter relies upon the arguments made in his brief-in-chief.

II. IF 2013 ACT 84 APPLIED TO THIS CASE, IT WAS UNCONSTITUTIONAL BECAUSE IT UNDULY RESTRICTED ACCESS TO THE COURTS FOR PERSONS COMMITTED UNDER CHAPTER 980 SEEKING TO TERMINATE THEIR COMMITMENT.

Carter reasserts that 2013 Act 84, if read literally and not as interpreted by the Court of Appeals in *State v. Hager*, 2017 WI App. 520, 373 Wis.2d 692, 892 N.W.2d 740 is unconstitutional for the reasons previously stated. However, the *Hager* interpretation of that statute, if upheld by this court, provides a better opportunity for Carter to seek discharge from his 980 commitment. The *Hager* interpretation provides more due process than the interpretation applied by the trial court but still establishes a system that is

rigged against sexually violent persons (SVPs) who seek discharge even if a petition is supported by a qualified expert.

As noted below, *Hager* does not allow weighing of the evidence but merely whether from the evidence as a whole a fact finder would “likely conclude” that a subject was no longer a sexually violent person. *Hager*, ¶¶2 and 4. That might result from new actuarial studies that have been peer-reviewed and apply to the subject or changes in a subject’s physical condition that substantially reduce or eliminate his ability to commit a sexually violent act. However, the *Hager* court’s interpretation of 2013 Act 84 still allows a trial court to block a discharge trial on the grounds that a judge may believe an impartial fact-finder would find the State had met its burden of proof based upon the older evaluations despite the obsolete data that supported those expert opinions even if a fact-finder would be presented with an evaluation based upon more recent science that re-evaluated risk. Carter’s right to due process even under *Hager* is significantly impaired to the point that it violates due process on its face.

III. CARTER AGREES THAT A REMAND TO RE-EVALUATE CARTER’S RIGHT TO A DISCHARGE TRIAL WOULD BE APPROPRIATE.

The State proposed in both *Carter* and *Hager* that the matters be remanded to the trial court for a determination of whether a discharge trial is warranted under Sec. 980.09, Wis. Stats. as amended by 2013 Act 84 as interpreted by this court (page 31 of State’s brief). Due to the unsettled nature of the law and the passage of time since the discharge petition was considered, that would be appropriate. Carter was placed on supervised release and revoked from supervised release because of rule violations while this appeal was pending so updated evaluations by the experts would probably be needed.

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 for a trial under *Arends* but not met its burden under 2013 Act 84 without weighing the evidence in some matter. Consideration of the evidence as a whole may amount to the same thing.

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. It is hard to say whether or not the Lytton report, taken as a whole with previous State reports opposing

discharge would meet the standard. Even though this court might be able to make that determination, it would be better to remand this case because of the passage of time and new facts that might bear on Carter's status as an SVP.

This court chose that path in *Arends* because of the new standards it established. *Arends*, ¶ 48. It would be appropriate here as well.

CONCLUSION

For the reasons stated above and in his brief-in-chief, 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 22nd day of July 2017

KACHINSKY LAW OFFICES
By: Len Kachinsky

Attorneys for the Respondent-Appellant-
Petitioner
State Bar No. 01018347
832 Neff Court
Neenah, WI 54956-2031
Phone: (920) 841-6706
Fax: (775) 845-7965
E-Mail: LKachinsky@core.com

CERTIFICATION AS TO LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 1437 words, including certifications.

Dated this 22nd day of July 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 22nd day of July 2017

LEN KACHINSKY