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FOR IMMEDIATE RELEASE

Wisconsin Supreme Court accepts six new cases

Madison, Wis. (June 1, 2017) – The Wisconsin Supreme Court has voted to accept six new cases and acted to deny review in a number of other cases. The case numbers, issues, and counties of origin of granted cases are listed below. Hyperlinks to Court of Appeals' decisions are provided where available. The synopses provided are not complete analyses of the issues. More information about any particular case before the Supreme Court or Court of Appeals can be found on the Supreme Court and Court of Appeals Access website.

2016AP474 CED Properties, LLC v. City of Oshkosh

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Winnebago County, Judge John A. Jorgensen, affirmed
Long caption: CED Properties, LLC, plaintiff-appellant-petitioner, v. City of Oshkosh, defendant-respondent

Issue presented: This dispute over special property tax assessments is on its second appeal to the Supreme Court. The Supreme Court reviews the process used to decide the case in lower courts, and whether a special assessment can be levied for a benefit that adds no monetary value to a commercial property. CED Properties, LLC contends the case presents a genuine issue of material fact, and therefore, should not have been decided on summary judgment.

Some background: At the center of this case is the city of Oshkosh's (the city) effort to impose a special assessment on property owned by CED Properties, LLC (CED) (which has a Taco Bell on it), for installation of a roundabout intersection and related improvements.

On July 27, 2010, the City passed a resolution to "reconstruct" the intersection to install a roundabout, and to replace traffic signals, concrete paving, asphalt paving, sanitary sewer laterals (new and relaid), storm sewer main and laterals, sidewalk replacement and repair, concrete driveway approaches, and streetscaping/landscaping improvements.

The total cost of the project was $4,060,000. The city's share was $1,449,250, of which $307,118.72 was special assessed to property owners adjacent to the intersection. The balance was paid by the state. First, the City used its power of eminent domain to acquire approximately six percent of CED's property for the project. CED and the city litigated the amount of just compensation owed to CED for this taking. In April 2012 the parties settled, agreeing that the

City would pay $180,000 in just compensation for the taking. The city was released from claims arising out of the condemnation action.

In the first appeal that came to the Supreme Court, CED challenged the initial assessments under Wis. Stat. § 66.0703(12). The circuit court granted the city's motion for summary judgment, finding that CED's appeal was ineffective and untimely. The Court of Appeals affirmed. *See* CED Props. LLC v. City of Oshkosh, 2013 WI App 75, 348 Wis. 2d 305, 836 N.W.2d 654, *rev'd*, 2014 WI 10, 352 Wis. 2d 613, 843 N.W.2d 382.

The Supreme Court reversed, with directions to the circuit court to enter summary judgment in favor of CED on remand due to the city's failure to comply with certain statutory assessment requirements.

The city thereafter reopened the matter and imposed special assessments on CED under § 66.0703(10). CED again contested the special assessments. The circuit court again granted summary judgment in favor of the city.

CED appealed and the Court of Appeals affirmed.

CED argues that the circuit court erred when it interpreted § 66.0703 to allow the city to exercise its police power and levy a special assessment because the city had failed to allege special benefits in the preceding eminent domain action under Wis. Stat. § 32.09(3).

The Court of Appeals, Judge Mark D. Gundrum dissenting, ruled that "special benefits" under eminent domain law and "special benefits" under special assessment law are completely different things. As such, it agreed that you don't need to have "special benefits" in an eminent domain action under § 32.09(3) in order to properly allege special benefits under a Wis. Stat. ch. 66 special assessment.

CED claims that it presented evidence supporting a genuine issue of material fact regarding the presence of special benefits in the special assessment context, such that summary judgement should not have been entered. They say that a jury issue exists as to whether the project conferred special benefits on the CED property.

CED disputes these "special benefits." It claims that the traffic "improvements" were actually detrimental to its tenant, Taco Bell, because roundabout intersections are disfavored by the public and actually impair fast food sites as fast food sites are "impulse stop[s]" which benefit from longer intersection delays.

CED says the city's power to levy a special assessment, while broad, is limited by § 66.0703 in that it must satisfy three requirements: (1) the assessment must be levied on property within a limited and determinable area, (2) the assessment must be "for special benefits conferred upon the property," and (3) the assessment must be made on a reasonable basis.

A decision by the Supreme Court is expected to clarify the difference, if any, between special assessments in the eminent domain and assessment context and to address what proof of the impact of the improvements may be needed to survive a summary judgment motion.

2016AP619 Winnebago County v. J.M.

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Winnebago County, Judge Karen L. Seifert, affirmed
Long caption: Winnebago County, petitioner-respondent, v. J.M., respondent-appellant-petitioner

Issues presented: This case involves an ineffective assistance of counsel claim by J.M., an individual who appeared before the jury wearing prison garb at his Wis. Stat. § ch. 51 extension proceeding. Chapter 51 pertains to commitments for mental disorders and developmental disabilities and for mental illness, alcoholism, and other drug abuse.

The Supreme Court reviews:

- Whether the subject of a Wis. Stat. § 51.20(l)(a) extension of involuntary commitment and involuntary medication order has a claim for ineffective assistance of trial counsel where his lawyer fails to object to, prevent the admission of, or request a curative instruction to address, evidence of his prisoner status during his jury trial?
- Whether the subject of a Wis. Stat. § 51.20(l)(a) extension of commitment is entitled to a new trial in the interests of justice where the jury repeatedly sees and hears evidence of his prisoner status?

Some background: J.M. contends that he was denied effective assistance of counsel because his attorney did not arrange for him to wear civilian clothes or, at a minimum, request a curative jury instruction. The Court of Appeals' affirmed orders extending J.M.'s ch. 51 commitment and denying his requests for post-disposition relief.

On Nov. 20, 2014, J.M. was involuntarily committed for a period of one year under Wis. Stat. § 51.20. As the end of his commitment approached, the county filed a petition to extend his commitment. J.M. requested and received a jury trial in the ch. 51 proceeding, which is separate and distinct from a criminal case.

J.M. was held at the Wisconsin Resource Center (WRC), a secure treatment center that managed by the Department of Health Services in partnership with the Department of Corrections. The WRC serves medium and maximum security inmates transferred from the Department of Corrections whose behavior presents a serious problem to themselves or others in the state prison system.

Before trial, J.M.'s attorney contacted the WRC about supplying J.M. with civilian clothes to wear on the day of the ch. 51 trial. The record does not say why counsel's attempt to get civilian clothing was unsuccessful.

At trial, the county called two expert witnesses to testify, both of whom had met with J.M. and evaluated his mental status. Both concluded that J.M. had schizophrenia and described incidents in which J.M. was extremely agitated and exhibited behavior they viewed as dangerous or threatening. J.M. told both doctors that he was "Lord," and he asked to have all of his records at the state Department of Corrections changed to reflect this.

J.M. testified on his own behalf, stating that he believed he was not mentally ill or dangerous and that the experts' conclusions were "opinions, not facts." J.M. then confirmed that he was "Jesus the Lord" and elaborated on this belief.

The jury's task, as set forth in § 51.20, was to determine (1) whether J.M. was mentally ill, (2) whether J.M. was a danger to himself or others, and (3) whether J.M. was a proper subject for treatment.

The jury answered all three questions in the affirmative. The circuit court ordered that J.M.'s commitment be extended. J.M. unsuccessfully sought a new trial. J.M. appealed and the Court of Appeals affirmed, leading to this appeal before the Supreme Court.

J.M. argues that the Supreme Court has "implicitly" found that this statutory right encompasses a right to effective assistance of counsel, citing Winnebago Co. v. Christopher S., 2016 WI 1, ¶4, 366 Wis. 2d 1, 878 N.W.2d 109.

The Court of Appeals found that this was not, actually, the holding of Christopher S. Rather, the ineffective assistance of counsel claim was raised, but the Supreme Court ultimately didn't reach the issue. The Court of Appeals also concluded that defense counsel's performance was not deficient, and, even if it was, J.M. suffered no prejudice under the two-prong Strickland test, Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court of Appeals also found that there is no established affirmative duty for counsel to ensure a ch. 51 client is not wearing prison garb, counsel's failure to pursue a curative limiting instruction was not constitutionally deficient.

J.M. says a defendant has a constitutional right to a presumption of innocence and that well-settled federal case law holds that criminal defendants cannot be compelled to wear prison garb. J.M. contends that trying a defendant in his prison garb may violate his constitutional right to a presumption of innocence under Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971) and to due process and equal justice under Estelle v. Williams, 425 U.S. 501, 506-508.

A decision by the Supreme Court is expected to determine whether the subject of a ch. 51 extension proceeding has a statutory right to *effective* assistance of counsel, and whether a defense lawyer is automatically deficient when he or she fails to procure civilian clothing for a defendant in a ch. 51 involuntary commitment.

2015AP2429-CR State v. Hendricks

Supreme Court case type: Petition for Review
Court of Appeals: District I (Dist. IV judges)
Circuit Court: Milwaukee County, Judge M. Joseph Donald and Judge David L. Borowski, affirmed
Long caption: State of Wisconsin, plaintiff-respondent, v. Shannon Olance Hendricks, defendant-appellant-petitioner

Issue presented: Do Wisconsin Stat. § 971.08(1) and State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) require that a defendant entering a guilty plea to child enticement with intent to have sexual contact understands the meaning of "sexual contact?"

In reviewing this case, the Supreme Court is also expected to consider the Court of Appeals' previous decision in State v. Steele, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595. The Court of Appeals' itself now questions the validity of its decision in Steele but acknowledges that it is bound by it until the Supreme Court may reconcile the issues presented.

Some background: Shannon Olance Hendricks was convicted of child enticement after initially being charged with second-degree sexual assault. He was sentenced to three years of initial confinement and four years of extended supervision for allegedly enticing a child to a secluded place with the intent to have "sexual contact."

Hendricks filed a post-conviction motion arguing that the plea colloquy was defective because the circuit court did not inquire into his understanding of "sexual contact."

The state conceded at this point that the plea colloquy was defective as alleged by Hendricks but offered to prove at an evidentiary hearing that Hendricks did enter a knowing plea.

The circuit court denied Hendricks' motion without a hearing, concluding there was no plea colloquy defect.

Hendricks appealed, unsuccessfully, with the state arguing that there was no defect in the plea colloquy. In upholding the circuit court's order denying the post-conviction motion, the Court of Appeals noted Steele.

Steele stated that a circuit court inquiring into a defendant's understanding of the nature of a charged crime during a plea colloquy need not inquire into a defendant's understanding of the particular alternative intended underlying the act if the act is not itself an element of the charged crime.

The Steele court observed that in State v. Hammer, 216 Wis. 2d 214, 219, 221, 576 N.W.2d 285 (Ct. App. 1997), it held that "the nature of the particular underlying felony is not an essential element of a burglary charge." Steele, 241 Wis. 2d 269, ¶9. In Hammer, that meant the defendant was not entitled to jury unanimity as to which felony Hammer intended when he entered a dwelling without consent. The Hammer court found it was sufficient if all jurors found that Hammer at least intended one of three felonies: sexual assault, armed robbery, or substantial battery.

The appellate court noted that under State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), if a defendant makes a prima facie showing of a plea defect and alleges that he did not understand the information that should have been provided during the colloquy, the burden shifts to the state to prove by clear and convincing evidence that the plea was knowing in spite of the defect. In this case, Hendricks was informed the act the state had to prove was that he intended to have "sexual contact" with the child. See § 948.07(1), Stats. During the plea colloquy, the circuit court did not inquire into whether Hendricks understood the meaning of "sexual contact."

The Court of Appeals concluded that the circuit court's brief exchange with counsel did not satisfy the court's obligation to inquire into Hendricks' understanding of the charged crime.

However, the Court of Appeals said its job under the Steele analysis is to determine if the particular act Hendricks allegedly intended to commit, sexual contact, is an essential element of child enticement. It said whether the "sexual contact" alternative in the child enticement statute is an element of the crime was answered in the negative in State v. Derango, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. The court noted that like Hammer, Derango was a jury unanimity case.

The Court of Appeals noted that in Steele, it said, "It follows from our conclusion in Hammer that the nature of the particular underlying felony is not an essential element of a burglary charge and therefore need not be explained during colloquy in order to [satisfy Bangert]." Steele, 241 Wis. 2d 269, ¶9.

The Court of Appeals said Steele compelled the conclusion that the elements analysis in Derango applied with equal force to the plea colloquy context.

The Court of Appeals said, "Although we question some of the law that binds us, we ultimately agree with the circuit court that, under this law, there was no plea colloquy defect."

Hendricks says the Supreme Court should address whether juror unanimity case law should apply to analyses of what a court must explain to ensure that a defendant entering a guilty plea in fact understands the nature of the charge.

The state says it will rely on an alternative ground for sustaining the judgment of conviction, i.e. that Hendricks knew the meaning of sexual contact or intent to have sexual intercourse from the victim's preliminary hearing testimony.

A decision by the Supreme Court discussing Steele is expected to clarify law in this area.

2016AP832 Horizon Bank, National Association v. Marshalls Point Retreat LLC
Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Door County, Judge D.T. Ehlers, reversed and cause remanded with directions
Long caption: Horizon Bank, National Association, plaintiff-appellant, v. Marshalls Point Retreat LLC and Marshall's Point Association, Inc., defendants, Allen S. Musikantow, defendant-respondent-petitioner

Issues presented:

- Where a foreclosure on mortgaged premises involves a guarantor, does Wis. Stat. § 846.165 require the trial court to determine the amount to be credited against the guarantor's obligation before confirming a sheriff's sale, or does the trial court have discretion to reach that issue later?
- If the trial court must determine the amount to be credited against a guarantor's obligation in connection with confirming a sheriff's sale, does the guarantor have a due process right to present evidence on the question of fair value?

Some background: In May of 2010, Horizon Bank loaned $5,000,000 to Marshalls Point Retreat LLC. The loan was secured by a mortgage on property in Sister Bay. Allen S. Musikantow provided a continuing guaranty of payment for the loan.

In 2015, Marshalls Point defaulted on the loan by failing to pay the balance due at maturity. The bank filed a foreclosure action asserting a claim to foreclose the mortgage on the property and a claim against Musikantow seeking a money judgment for the outstanding balance of the loan, pursuant to the terms of his guaranty.

The parties entered into a stipulation and order for judgment for foreclosure. The circuit court entered judgment on the stipulation on Sept. 10, 2015. The judgment stated that Marshalls Point owed Horizon Bank $4,045,555.55, and it granted the bank a money judgment against Musikantow in that amount.

The judgment further provided the Sister Bay property would be sold at a sheriff's sale, and *"[t]he amount paid to [Horizon Bank] from the proceeds of said sale of the Premises, remaining after deduction by [Horizon Bank] of the amount of interest, fees, costs, expenses, disbursements and other charges paid or incurred by [Horizon Bank] not included in the monetary judgment against [Musikantow] (set forth below) shall be credited by [Horizon Bank] as payment on said monetary judgment."*

Horizon Bank was the successful (and only) bidder at the sheriff's sale with a bid of $2,250,000. Horizon Bank moved to confirm the sale, asserting that its bid represented the "fair value" of the property. The bank asked the circuit court to reduce the amount of the money judgment against Musikantow by the amount of the bank's winning bid.

In response to the bank's confirmation motion, the defendants indicated they had no objection to either a statutory fair value finding or final confirmation of the sale provided those actions have no preclusive effect on a future determination of the amount of Musikantow's credit.

Before moving to confirm the sale, the bank had filed a federal action against Musikantow in U.S. District Court for the Middle District of Florida, where he lives.

At the close of the hearing, the circuit court granted the bank's motion for confirmation of the sheriff's sale, finding that the bid price of $2,250,000 represented the "fair and reasonable value for the property." The court also granted Musikantow's oral motion and declined to rule on the credit to be applied to the money judgment against him. Musikantow indicated he had a witness who was prepared to testify that the property had a "market value" in excess of $10,000,000.

The court said it would not address the credit to be applied to the money judgment because the guaranty clearly indicated it was to be governed by federal law. Counsel argued the amount of the credit to be applied against the money judgment was "more likely to be litigated in the State of Florida."

The circuit court entered an "Order Confirming Sheriff's Sale," confirming the sale of the property to Horizon Bank and stating that the amount bid by the bank represented the fair value of the premises. The court crossed out the final paragraph of the order, which stated the amount due under the judgment entered against Musikantow.

The court also entered an order stating that in light of the language in the guaranty document indicating it was to be governed by federal law, granting Musikantow's motion to decline to make a finding of the amount to be credited against the bank's judgment against him. The order said the court "will, if requested by a Federal Court, make a determination as to such amount to be credited against the judgment."

The bank appealed that order. The Court of Appeals reversed and remanded. The Court of Appeals concluded the circuit court misinterpreted the governing law provision. It said there was no reason why the circuit court could not apply whatever law was appropriate, whether it be Wisconsin law, federal law, or Indiana law, in order to determine the appropriate credit to apply to the money judgment against Musikantow. The appellate court concluded that the circuit court erred in refusing to determine the amount of the credit and should have applied a $2,250,000 credit toward the money judgment against Musikantow.

Musikantow argues that § 846.165, Stats., does not require the credit determination mandated by the Court of Appeals. He says there is nothing in ch. 846 to prohibit trial courts from doing exactly what the trial court did here. He says the "credit" referenced in § 846.165(2) is a credit "on the mortgage debt," not on any judgment obtained against a third-party guarantor.

Musikantow argues, among other things, that tying guarantors' credit amounts to lenders' credit bids violates the common law rule against double recovery. He says he was prepared to prove that the value of the property is several times the amount of the bank's bid and in light of that fact the Court of Appeals' interpretation of the parties' stipulation should have been guided by the common law rule against double recovery.

The bank says this claim ignores the fact that Musikantow appeared with his attorney for a confirmation hearing scheduled to last three hours so he could present his valuation evidence, but then he affirmatively chose not to present it. The bank says the Court of Appeals enforced the terms of the judgment stipulated to by Musikantow.

The bank argues if a guarantor thinks a lender's bid at a sheriff's sale was too low, then the guarantor should bid the price up to take the opportunity to acquire a valued property at a discount or the guarantor should challenge the fair value finding and force a resale if the amount bid shocks the conscience of the court. The bank says Musikantow did neither.

2015AP330 State v. Hager

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Chippewa County, Judge James M. Isaacson, reversed and cause remanded for further proceedings
Long caption: State of Wisconsin, petitioner-respondent, v. David Hager, Jr., respondent-appellant-petitioner

Issue presented: This is one of two cases (see also 2015AP1311 State v. Carter) recently granted for review that examines amendments to Wis. Stat. § 980.09. The amendments changed the standards for the circuit court's determination of whether a petitioner who has been committed under ch. 980 – the state law addressing the commitment of a sexually violent person – will receive a discharge trial.

The Supreme Court reviews the question: When circuit courts are determining whether a patient has met this higher "would likely conclude" standard, can the courts now compare the newly proffered evidence with evidence already in the record and submitted by the State to determine whether to grant a discharge trial?

Some background: Effective Dec. 14, 2013, a circuit court must grant a committed ch. 980 patient a discharge hearing if the patient's petition alleges facts from which a factfinder "would likely conclude" that the patient's condition has changed so that he no longer meets the criteria for commitment as a sexually violent person. Wis. Stat. § 980.09(2) (2013–14).

In 1995, David Hager, Jr. was convicted of three counts of incest with a child. He was civilly committed as a sexually violent person in 2008, following a jury trial. Hager filed petitions for discharge each year from 2009 to 2011. Each time, he voluntarily withdrew the petition before receiving a discharge trial. Hager voluntarily withdrew his 2011 petition despite the state's concession that the petition, together with the accompanying examination report by a licensed psychologist, was legally sufficient to warrant a trial.

In 2012, Hager filed a pro se discharge petition. The state opposed the petition, and the circuit court denied it. Although he was represented by counsel, Hager filed another pro se discharge petition in 2013. At Hager's attorney's request, the circuit court appointed psychologist Hollida Wakefield to conduct a psychological examination.

Wakefield concluded that Hager's risk of reoffending was "below the level of risk required for commitment under ch. 980."

The state filed a response urging the circuit court to deny Hager's petition without holding a discharge trial. The circuit court denied Hager's petition following a non-evidentiary hearing. The court remarked that Hager was "still the same person he was," and the court said it was "not satisfied there has been any change in the expert's knowledge of Mr. Hager or his offense." A motion for reconsideration was denied.

The Court of Appeals ultimately agreed with Hager.

The Court of Appeals noted that initially, circuit courts were required to hold probable cause hearings under certain circumstances to ascertain whether facts existed to warrant a discharge hearing. See § 980.09(2)(a) (2003-04).

In 2006, the Legislature replaced a mandatory probable cause hearing with a two-step process. The first step, as mandated by § 980.09(1) (2005-06) was "a very limited review aimed

at ensuring the petition is sufficient." State v. Arends, 2010 WI 46, ¶28, 325 Wis. 2d 1, 784 N.W.2d 513.

If the petition was facially sufficient, the court proceeded to a review under § 980.09(2), which contained a second level of review before the petitioner would be entitled to a hearing. This level of review focused on whether the record in toto contained facts that could support relief for the petitioner at a discharge hearing. During this second phase of review, the circuit court was not permitted to make credibility determinations or weigh evidence favoring the petitioner directly against evidence disfavoring him.

The Court of Appeals noted that in Act 84, the legislature changed both § 980.09(1) and (2). The state argued the changes altered the procedure articulated in Arends in a manner that abrogated Arends.

The state argued that § 980.09(2) now requires circuit courts to "weigh" the petitioner's proffered evidence against any evidence the state marshals in its favor. Hager rejected the state's claim that a weighing or balancing process was contemplated, and he argued that Arends survived Act 84's enactment.

The Court of Appeals said the increase in the pleading standard brought about by Act 84 did not clearly signal the Legislature's intent to overrule Arends and adopt a "weighing" procedure during a § 980.09(2) review. Instead, the Court of Appeals said the Act 84 changes to § 980.09(2) suggest that the Legislature intended to codify State v. Combs, 2006 WI App 137, 295 Wis. 2d 457, 720 N.W.2d 684, and its progeny.

The state says the Court of Appeals' decision leaves basic questions undecided including:

- How are courts to determine when a patient meets his burden for receiving a discharge trial?
- Can courts only consider half of the evidence when it makes that determination?
- How could a circuit court ever conclude that a patient has not met his burden when a court can only consider the evidence in favor of the patient's petition?

Hager says the state's push to require circuit courts to "weigh" the evidence supporting and opposing a committed person's petition for discharge is an invitation to read language into § 980.09(2) that is not there.

2015AP1311 State v. Carter

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Brown County, Judge Kendall M. Kelley, affirmed
Long caption: State of Wisconsin, petitioner-respondent, v. Howard Carter, respondent-appellant-petitioner

Issues presented: This is one of two cases (see also 2015AP330 State v. Hager) recently granted for review that examines amendments to Wis. Stat. § 980.09. The amendments changed the standards for the circuit court's determination of whether a petitioner who has been committed under ch. 980 – the state law addressing the commitment of a sexually violent person – will receive a discharge trial.

The Supreme Court reviews three issues:

- Did the trial court err in denying Howard Carter a trial on his petition for discharge because 2013 Wis. Act 84 did not apply to this case and counsel was ineffective in not objecting to its application?
- If 2013 Wis. Act 84 applied to this case, should the saving construction applied by the Court of Appeals in State v. Hager 2015AP330 be applied and was Carter entitled to a discharge trial under that construction?
- If 2013 Wis. Act 84 applied to this case, was it unconstitutional because it unduly restricted access to the courts for persons committed under ch. 980 seeking to terminate their commitment?

Some background: Howard Carter was civilly committed as a sexually violent person in 2009, following a jury trial. Carter underwent annual examinations to determine if he met the conditions for supervised release or discharge.

Carter filed petitions for discharge in 2010 through 2012, withdrawing each before a discharge trial. He filed another petition in February 2013, following his annual reexamination, in which the evaluating doctor said he was not a suitable candidate for either supervised release or discharge.

An amended petition was filed in December 2013. The circuit court appointed Dr. Diane Lytton, a licensed psychologist, as Carter's expert. Lytton's report supported Carter's discharge petition. She disagreed with earlier experts' diagnoses. She acknowledged that, due to his rule-breaking and dishonesty, Carter "most likely can continue to be diagnosed with antisocial personality disorder."

However, Lytton concluded this condition did not predispose Carter to commit acts of sexual violence, and she opined Carter was not more likely than not to reoffend. Dr. Lytton also cited as mitigating factors Carter's age and significant progress in treatment at Sand Ridge Secure Treatment Center.

At a motion hearing in February 2014, the state argued the circuit court should apply the new amendments to Wis. Stat. § 980.09(1) and (2). The amendments were included in 2013 Wis. Act 84, which became effective on December 14, 2013. The amendments required the circuit court to deny the discharge petition without a hearing unless the petition alleges facts, supported by the record, "from which the court or jury would likely conclude" Carter's condition had changed since his initial commitment such that he should no longer be civilly committed. Carter's attorney did not argue for the application of the previous "may conclude" standard, nor did he object to the application of the new standard.

The state conceded Carter's petition was facially sufficient under Wis. Stat. § 980.09(1). However, the state asserted Carter's petition failed upon a review of the record under § 980.09(2) because Carter had not alleged anything "new."

The circuit court concluded Carter was not entitled to a discharge trial based on either a favorable change in professional knowledge or sufficient progress in treatment.

Carter moved for reconsideration, alleging ineffective assistance of counsel. Carter alleged his first attorney was ineffective for not challenging Act 84's applicability. He also argued the legislature's adoption of the new discharge standard dramatically increased the requirements for obtaining a discharge trial and was thus unconstitutional.

Following a Machner hearing [State v. Machner, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)] , the circuit court denied Carter's motion. It concluded the Act 84 amendments

applied retroactively to Carter's petition. It rejected Carter's claim that counsel was ineffective. It also rejected Carter's due process challenge.

Carter argued that the amendments could not be applied retroactively to him because he had a "vested right" to a discharge trial. The Court of Appeals disagreed. It said when the existence of a right is contingent on an uncertain future event, such as Carter's satisfaction of the preliminary requirements under § 980.09 (1) and (2), and that event has not occurred prior to the enactment of a statute, there is no vested right to the application of the prior law. See Lands' End, Inc. v. City of Dodgeville, 2016 WI 64, ¶50, 370 Wis. 2d 500, 881 N.W.2d 702.

Having concluded, as a matter of law, that Act 84's amendments to Wis. Stat. § 980.09(1) and (2) apply retroactively to Carter, the Court of Appeals concluded Carter's first attorney did not perform deficiently by failing to object to the statute's retroactive application. It said trial counsel's failure to bring a meritless motion does not constitute deficient performance.

The state says if only the facts favorable to the patient are considered, then a fact finder will always be likely to rule in favor of the patient. Instead, the state says it views the statutory changes as essentially adapting the well-established rules for obtaining a new criminal trial on the basis of newly discovered evidence to a patient's request for a new discharge trial.

Review denied: The Supreme Court denied review in the following cases. As the state's law-developing court, the Supreme Court exercises its discretion to select for review only those cases that fit certain statutory criteria (see Wis. Stat. § 809.62). Except where indicated, these cases came to the Court via petition for review by the party who lost in the lower court:

Brown

2015AP1668	State v. Berry
2015AP2501-02-CR	State v. Casteel
2016AP594	Village of Ashwaubenon v. Bowe
2016AP647-CR	State v. Gant

Columbia

2016AP277-CR	State v. Selenius

Dane

2015AP1175	State v. Bohanan
2016AP1133-CR	State v. Flahavan
2016AP1891-W	Stelter v. Meisner

Dodge

2016AP764-CR	State v. Turck

Douglas

2015AP2285-CR	State v. Jardine

Fond du Lac

2015AP507	State v. Rico

Jackson

2016AP2485	State v. Cholka

Jefferson

2016AP435-CR	State v. Weiss

Juneau

2016AP572-CR	Jones v. Sand Ridge Secure Tr. Center

Kenosha

2015AP318	Mullany v. Massie
2015AP1957-CR	State v. Garcia
2015AP2072	State v. Mosley
2016AP586-CR	State v. Atilano

Marathon

2016AP1066-CR	State v. Hartleben

Milwaukee

2014AP1983-CR	State v. Gutierrez
2015AP1666-CR	State v. Gandy
2015AP2128-30-CR	State v. Brown
2015AP2337-CR	State v. Williams
2015AP2484-CR	State v. Russell
2015AP2529-CR	State v. Jordan
2015AP2592-CRNM	State v. Evers
2015AP2593-CR	State v. Anderson
2016AP50-CRNM	State v. Boyd
2016AP55-CR	State v. Wheeler

2016AP338-CR State v. Pugh

2016AP632-CR State v. Fidler
Chief Justice Patience Drake Roggensack did not participate.

2016AP1460 State v. P.T.

2016AP1488 State v. D.T.

2016AP1553-54 State v. T.T.H.

2016AP2204-W Johnson v. Percy

2016AP2510-W Griffin v. Dallet
Chief Justice Patience Drake Roggensack did not participate.

Oneida
2015AP2612 Oneida Co. v. Raven

Outagamie
2014AP2413 M.L. v. Outagamie Co.

2015AP2241/2016AP111 R.L. v. Outagamie Co.

2016AP364-CR State v. Hull

2016AP1113 Deng v. Risberg

2016AP2135-W Lietz v. Cir. Ct. Outagamie Co.

Ozaukee
2014AP2201-CR State v. Williams

2017AP529-W Zahn v. Capri Senior Communities

Pierce
2015AP2490 Kunz v. Kunz

2016AP1108 Most v. Pechacek

Polk
2016AP90-CR State v. Moen

Racine
2015AP237 State v. Ohlinger

2015AP1824-CR State v. Henningfield

2016AP157-58-CR State v. Fitzgerald

2016AP1321 State v. C.M.

Rock
2015AP947-49-CR State v. Nichols

2016AP2150-W Humphrey v. Douma

Sauk
2016AP2012 State v. Elbe

Sheboygan
2015AP92-CR State v. Henry

2015AP2544-CR State v. Hanson

2016AP179 Krebsbach v. MMIC Ins.

Walworth
2016AP2132-CRNM State v. Lavender

Washington
2014AP2095 Martinez v. Hayes

2016AP500-CR State v. Keller

Waukesha
2015AP1859/2016AP146 Holtz v. Steiner

2016AP239 City of New Berlin v. Hrin

2016AP554 Waukesha Co. v. Ridl

Wood
2016AP884-CR State v. McKeel