STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2016AP001082

In re the Commitment of Michael L. McGee:
STATE OF WISCONSIN,

Petitioner-Respondent,

COUNTY OF KENOSHA,

Intervenor-Appellant-Cross-Respondent,

v.

MICHAEL L. McGEE,

Respondent-Respondent-Cross Appellant.

Appeal of an Order Granting Kenosha County's
Motion to Intervene Entered in Racine County Circuit Court,
Judge Allen B. Torhorst, Presiding

CROSS-APPELLANT'S REPLY BRIEF

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Respondent-Respondent-Cross-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

ARGUMENT

I. Kenosha County Did Not Have a Right to Intervene.

There is no dispute Kenosha County satisfied the timeliness requirement for intervention as of right under Wis. Stat. § 803.09(1). However, the County has failed to show it meets the other three requirements for intervention.

A. Kenosha does not have a sufficient interest in the proceeding.

The person moving for intervention must have an interest in the proceedings "'of such direct and immediate character that the movant will gain or lose by the direct operation of the judgment.'" ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶45, 307 Wis. 2d 1, 745 N.W.2d 1 (footnotes and quoted sources omitted). *Cf.* ***One Wisconsin Institute, Inc. v. Nichol***, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (movant must have "a direct, significant, and legally protectable interest" in the question at issue in the case).

The County disputes the need to show a legally protectable interest, arguing that standard was rejected by ***State ex rel. Bilder v. Township of Delavan***, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983), in favor of a broad, pragmatic approach that views the interest element "practically rather than technically." (Cross-Respondent's Brief at 8). ***Bilder***'s adoption of this broad approach was not a rejection of the "legally protectable interest" standard. ***Bilder*** upheld intervention because the movants had a "protectable legal interest" in the disclosure of the records that one of the parties was seeking to keep under court seal. ***Bilder***, 112 Wis. 2d at 546, 549. So did the movant in ***Wolff v. Town***

of Jamestown, 229 Wis. 2d 738, 745, 601 N.W.2d 301 (Ct. App. 1999) (town had right to intervene in lawsuit regarding county's denial of conditional use permit because statute authorizing towns to pursue certiorari challenges to county decisions gave township legally protected interest). Thus, ***Bilder*** "may be interpreted to require that an interest at least be 'legally protected.'" ***Helgeland***, 307 Wis. 2d 1, ¶43 n.40.

The County conflates *legally protectable interest* with *judicially enforceable right*, for immediately after citing ***Bilder*** the County notes that a movant need not show it has a "judicially enforceable right"—that is, a right that may be asserted in a separate cause of action. ***Helgeland***, 307 Wis. 2d 1, ¶46 n.46. (Cross-Respondent's Brief at 9). The movants in ***Bilder*** and ***Wolff*** had judicially enforceable rights (mandamus in ***Bilder***, 112 Wis. 2d at 550; certiorari in ***Wolff***, 229 Wis. 2d at 745-46), but McGee agrees the County need not demonstrate that here; rather, the County must demonstrate a legally protectable interest, which is a different question.

In circuit court Kenosha claimed its interest was based on provisions added to Wis. Stat. § 980.08(4) by 2015 Wisconsin Act 156 that require the Department of Health Services to consult with local authorities. (81:12-13; Cross-A-App. 123-24). McGee's Cross-Appellant's Brief (at 10-15) argued that, based on the text, purpose, and history of § 980.08(4), the changes made by Act 156 do not give counties of intended placement a legally protectable interest in supervised release proceedings.

The County does not address McGee's arguments. Instead, it simply asserts it is "entitled to be heard" on the placement of a person from another county (Cross-Respondent's Brief at 10) and is "entitled to protect its statutory rights" under the amendments made by Act 156 and

"hold DHS accountable for failing to adhere to Wis. Stat. § 980.08(4)" (*id.* at 11). While the County twice cites § 980.08(4) and Act 156 and once refers to a Wisconsin Legislative Council memorandum (*id.* at 2, 3, 8, 11), it neither quotes nor discusses specific statutory language supporting its assertions that it was "entitled to be heard" or had "other statutory rights" to protect, nor does it discuss the purpose, context, or history of the statute. Because the County fails to develop a legal argument in support of its assertions, this court should not consider them. ***State v. Petit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

In addition to being unsupported by legal argument, one of Kenosha's assertions—that it is entitled to "hold DHS accountable for failing to adhere to" § 980.08(4) (Cross-Respondent's Brief at 11)—is based on a false premise. As McGee explained in the Respondent's Brief portion (at 10-23) of his combined brief, DHS *did* adhere to § 980.08(4), except for the harmless failure to consult with the victim-witness coordinator under § 980.08(4)(f)(intro.).

Further, even if Kenosha need not show a legally protectable interest, the interest Kenosha has is not an interest of such "direct and immediate character" that it "will gain or lose by the direct operation of the judgment." ***Helgeland***, 307 Wis. 2d 1, ¶45. Citing ***Wolff*** and saying it has an interest in the well-being of its residents, the County argues its residents "will be impacted" by the placement order because McGee will be living in the county. (Cross-Respondent's Brief at 10-11).

This argument concedes McGee's argument (Cross-Appellant's Brief at 16-18) that Kenosha's interest is not in compliance with § 980.08(4) in and of itself; its interest is in protection of the public. This interest is not unique to the

County. *All* local governments have that interest. So does the State. Thus, the County does not have a special or unique stake in the outcome of the proceeding. *Cf.* ***One Wisconsin Institute***, 310 F.R.D. at 397 (movant must have a significant interest that is "unique" to the intervenor). This generalized interest also means Kenosha must make a strong showing on the other two intervention requirements. ***Helgeland***, 307 Wis. 2d 1, ¶74.

Moreover, given the general nature of Kenosha's interest, it has not shown what it will gain or lose by the direct operation of the order. While the County says there is "no question" that its residents "will be impacted" by the release order because McGee will be living in their community (Cross-Respondent's Brief at 10), it fails to explain how this causes a loss or harm. The mere fact McGee will reside in the community does not show a loss or harm, and concluding it does based on vague concerns about "inherent risk" (*id.* at 16) requires both speculation and disregard of the supervised release plan, which includes intensive supervision by the Department of Corrections, GPS monitoring, and, for the first year at least under § 980.08(9)(a), an escort whenever McGee leaves the residence. (31:3-4, 8-10; A-App. 108-09, 113-15).

Finally, in his Cross-Appellant's Brief (at 15-16) McGee argued that if Kenosha has an interest based on the consultation requirements in § 980.08(4), then every county of intended placement will have sufficient interest to intervene in supervised release proceedings, a result inconsistent with judicial efficiency, avoiding lengthy, complex litigation, and allowing the parties to conduct and conclude their litigation. ***Helgeland***, 307 Wis. 2d 1, ¶40. The County disputes this argument, but not by explaining why the claims it makes will not apply to other counties of intended

placement. Instead, it suggests that once this case is concluded and § 980.08(4) is clarified as to the roles of DHS and the counties, intervention in future cases will be unnecessary. (Cross-Respondent's Brief at 12). This reasoning is faulty.

As McGee explained (Cross-Appellant's Brief at 15), most, if not all, of DHS's searches for placement will involve more than one county, and Kenosha does not dispute that point. If a county of intended placement has a right to intervene due to the consultation requirements in § 980.08(4), then as long as the final placement decision is in flux, any county under consideration for placement has incentive to intervene to raise issues about DHS's work. Clarifying what the statute means does not avoid that problem because whether DHS has done what is required will always be a question of fact.

Likewise, if intervention is proper because of a county's interest in public protection, clarifying § 980.08(4) does not make this interest less salient in future cases. Intervention is still likely because even if DHS strictly adheres to the statute, the county selected for placement has incentive to intervene to challenge the circuit court's exercise of discretion in ordering the placement, arguing that the court failed to consider or give proper attention to specific relevant facts, relied on erroneous factual information, or improperly applied a provision under § 980.08(4)—just as Kenosha does in this case.

Thus, clarifying § 980.08(4) will not obviate the bases for intervention in future cases, and finding that Kenosha has an interest justifying intervention will give a green light to other counties to intervene in other supervised release proceedings in the future.

B. Kenosha's ability to protect its interest is not impaired or impeded.

The third requirement for intervention asks whether the disposition of the proceeding may impair or impede the movant's ability to protect its interest. While it is analyzed separately, it is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest. ***Helgeland***, 307 Wis. 2d 1, ¶79.

The County reiterates that it has an interest in ensuring § 980.08(4) was followed so that it can protect the well-being and safety of its citizens, and that its ability to protect its interest is affected because no other party—in particular, the State—will not adequately represent the County's interests. (Cross-Respondent's Brief at 13-14).

As explained above, the County's only interest here is the general one of public protection, and it has no separate interest in making sure DHS follows procedure just for the sake of following procedure. Thus, this factor ultimately turns on whether the existing parties adequately represent Kenosha's general interest. McGee will address the arguments on this issue in the next section, which explains why the State, represented in this case by the Racine County District Attorney, will represent that interest.

C. The State will represent Kenosha's interest.

Kenosha argues its interests will not be adequately represented by the existing parties, citing the standard that the showing required for proving inadequate representation is "minimal." (Cross-Respondent's brief at 15-17).

While the showing required to prove inadequate representation is minimal, it "cannot be treated as so minimal as to write the requirement completely out of the rule." ***Helgeland***, 307 Wis. 2d 1, ¶85. And, even under the "minimal" showing standard:

> If a movant's interest is identical to that of one of the parties, or if a party is charged by law with representing the movant's interest, a compelling showing should be required to demonstrate that the representation is not adequate. When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential intervenor.

Id., ¶86. The County concedes its interest is "similar" to the interest of the other parties. (Cross-Respondent's Brief at 16). That weighs against intervention, even under the minimal showing standard.

Further, the County's interest—public protection—is identical to the State's interest; therefore, the County must make a compelling showing that the State's representation is not adequate. The County concedes its interest is public protection, but asserts the fact this is an out-of-county placement gives it a unique additional interest the State cannot adequately represent. It also says the State's interest diverged from Kenosha's because the State did not join its arguments concerning DHS's compliance with § 980.08(4). (Cross-Respondent's Brief at 13-14, 16-17). These arguments should be rejected.

First, contrary to Kenosha's suggestion (Cross-Respondent's Brief at 14), DHS is not a party to this case, so any disagreement between DHS and Kenosha is irrelevant to whether the parties adequately represent the County's interests. The parties are McGee and the State as an entity,

represented by the attorney general or a district attorney. Wis. Stat. § 980.02(1) and (2)(b) and (c).

Second, that the State's lawyer is the Racine County District Attorney does not mean the State's lawyer has no "sworn duty" to Kenosha County residents. (Cross-Respondent's Brief at 17). The prosecuting entity in ch. 980 proceedings is the State on behalf of all state citizens. The State is a single entity; a district attorney is simply the representative of the State in the relevant prosecutorial unit. Wis. Stat. § 978.01.

Thus, a district attorney is not protecting only the citizens of his or her own prosecutorial unit. A district attorney is obliged to uphold and enforce the law, including the requirements of ch. 980, regardless of whether the subject of the proceeding is going to remain in the district attorney's county or will be confined or supervised in another county. *Cf.* ***Reyes v. Greatway Ins. Co.***, 220 Wis. 2d 285, 304, 582 N.W.2d 480 (Ct. App. 1998) (noting that "a district attorney represents the broader public interest in the effective administration of criminal justice"). Accordingly, the fact the placement in a supervised release case will be out-of-county does not alter the prosecutor's duties.

Third, that the prosecutor did not join every argument Kenosha makes does not show the State's representation is inadequate. The prosecutor did not join Kenosha's arguments about compliance with § 980.08(4), but, again, Kenosha's interest is not in compliance *per se*, but in public protection. That interest was advanced by the prosecutor's argument that the placement was inappropriate because a child lived next door (43; 49; 82:123), for an argument about the appropriateness of the placement under § 980.08(4)(g) clearly

addresses the public protection interest shared by the State and County.

Further, a party need not adopt every argument or position of an intervenor in order to represent the intervenor's interest adequately. Parties get to make reasonable decisions about litigation strategy. ***Helgeland***, 307 Wis. 2d 1, ¶¶111-12. Here, the prosecutor could reasonably conclude that arguments about § 980.08(4) were unlikely to succeed because:

- DHS consulted with law enforcement as to the residence, as required by § 980.08(4)(em), which was what revealed there was a child living next door (82:9-11, 13-14; R-App. 109-11, 113-14);

- DHS's failure to consult in advance with the victim-witness coordinator under § 980.08(4)(f)(intro.) was harmless because, as the prosecutor noted, McGee's case is too old to have registered victims (82:47-49; R-App. 147-49); and

- There was good cause to look outside Racine County *despite* the changes made by Act 156 because DHS looked even after Act 156 and could not find a placement. (57:4; A-App. 122).

On the last point, Kenosha suggests there was not good cause to look for a placement outside Racine County because no witness testified to DHS's search methodology after Act 156. (Cross-Respondent's Brief at 2-3). Two witnesses from DHS explained they continually look for in-county placements for supervised release candidates; that even *after* Act 156 they

continued to look for a Racine County placement for McGee; and that despite Act 156's limitation on local ordinances they could not find a placement for McGee in Racine County. (82:54-55, 67-70, 74-75, 76, 77-78, 95-97, 101-05, 107-11; R-App. 154-55, 167-70, 174-75, 176, 177-78, 195-97, 201-05, 207-11). The County presented no contrary evidence and the circuit court accepted the witnesses' testimony. (57:4; A-App. 122). This court affirms the circuit court's factual findings unless they are clearly erroneous, Wis. Stat. § 805.17(2), and Kenosha does not argue the circuit court's factual findings are clearly erroneous. Thus, when Kenosha says it is "easy for a Racine County Judge to order there is simply no place for a violent sex offender in Racine County" (Cross-Respondent's Brief at 18), that is because the evidence amply supports the circuit court's conclusion.

That the State has not filed briefs in this appeal (Cross-Respondent's Brief at 17) does not show inadequate representation, given that the County was allowed to intervene and has continued to pursue all of its arguments. The State may also have declined to pursue its challenge to the release order because it reasonably concluded there was little likelihood of success on appeal under the highly deferential standard of review that applies—namely, whether the circuit court erroneously exercised its discretion, ***State v. Thiel***, 2012 WI App 48, ¶6, 340 Wis. 2d 654, 813 N.W.2d 709.

Finally, McGee argued in his Cross-Appellant's Brief (at 21-22) that two rebuttable presumptions supported a finding of adequate representation. The County does not expressly acknowledge them, though the arguments it makes about the State's representation address the second presumption—that when the party is a state governmental officer responsible for representing the State's interests, it is

presumed the State will adequately represent the interests of its citizens. ***Helgeland***, 307 Wis. 2d 1, ¶91 n.81. For the reasons just given, Kenosha's arguments do not rebut that presumption. The County does not address the presumption that adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action objective, ***id.***, ¶90, so that presumption is not rebutted.

For the above reasons, Kenosha has not shown three of the four requirements necessary to intervene as a matter of right.

II. Permissive Intervention is not Appropriate.

Kenosha argues this court should find permissive intervention under § 803.09(2) would have been proper in this case. (Cross-Respondent's Brief at 17-20). This argument should be rejected, for two reasons.

First, as McGee argued in his Cross-Appellant's Brief (at 24-25), when intervention as of right is denied because the intervenor fails to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears. ***One Wisconsin Institute***, 310 F.R.D. at 399. In response Kenosha reiterates its argument that the State does not adequately represent its interest. (Cross-Respondent's Brief at 18-19). For the reasons given above the State will adequately represent the County's real interest here—public protection. Thus, the case for permissive intervention disappears.

Second, even if this court concludes the circuit court could have permitted intervention, it should remand an exercise of discretion because this court cannot exercise discretion vested in the trial court. ***Wis. Assoc. of Food***

Dealers v. City of Madison, 97 Wis. 2d 426, 434-35, 293 N.W.2d 540, 545 (1980).

CONCLUSION

For the reasons given above and in McGee's Cross-Appellant's Brief, this court should reverse the order granting Kenosha County's motion to intervene in McGee's supervised release proceeding.

Dated this 9th day of December, 2016.

Respectfully submitted,

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Respondent-Respondent-Cross-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,995 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of December, 2016.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Respondent-Respondent-Cross-Appellant