STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2021AP678

In the Matter of the Mental Commitment of P.P.:

Rock County,

Petitioner-Respondent,

v.

P.P.,

Respondent-Appellant.

PETITION FOR REVIEW OF RESPONDENT-APPELLANT-PETITIONER

On Appeal from a Final Order of the Rock County Circuit Court,
Case No. 20ME63,
The Honorable Daniel T. Dillon, Presiding

Elizabeth Rich
State Bar No. 1019123
Attorney for Respondent-Appellant

Rich Law SC
435 E. Mill St., Suite 3
Plymouth, WI 53073
920.892.2449
erich@rich-law.com

TABLE OF CONTENTS

ISSUES PRESENTED

1. Whether P.P.'s appeal of his involuntary medication order is moot.

The trial court held that the appeal is moot.

2. Whether the evidence in the record was sufficient to support issuance of the involuntary medication order, and whether the trial court applied an incorrect standard in issuing the order.[1]

The Court of Appeals discussed the sufficiency of the evidence issue, but did not formally decide it because it determined that the case was moot. The Court of Appeals did not discuss or decide whether the trial court applied an incorrect standard in issuing the order.

CRITERIA FOR REVIEW

The issues for review pose recurring, real and significant questions of law regarding mootness as applied to appeals of involuntary medication orders, as well as proper application of the standards set forth in Wis. Stat. §51.61(1)(g)(4).

This Court has addressed mootness in Chapter 51 commitments and recommitments in several cases recently. *See, e.g. Marathon Cty v. D.K.,* 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901. But *D.K.* was a challenge to an involuntary commitment rather than an

[1] In the "Issues" section of his Initial Brief, P.P. identified the issue presented as "whether the evidence in the record was sufficient to support issuance of the involuntary medication order." Counsel for P.P. inadvertently omitted the additional language above, "and whether the trial court applied an incorrect standard in issuing the order." The language was included in the table of contents for the brief, and in the "Argument" section of the brief. The brief addressed the substance of the argument at pp. 22-23. In any event, this Court can review the issue pursuant to its authority under Wis. Stat. §809.62(1r)(2)(a).

involuntary commitment order. This distinction was apparently important to the Court of Appeals. *See Rock County v. P.P.,* 2021AP678 (December 16, 2021), ¶12. This Court should clarify that the mootness analysis spelled out in *D.K.* is applicable not only to involuntary commitment orders, but also to involuntary medication orders. Such a decision by this Court will help develop, clarify, and harmonize the law, and will address a question of law of the type that is likely to recur unless resolved by this Court. Wis.Stat. §809.62(1r)(c).

This Petition for Review demonstrates a need for the Wisconsin Supreme Court to consider establishing a policy within its authority, as it did in *Langlade County v. D.J.W.,* 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. Prior to *D.J.W.,* many trial courts had become lax in their application of the dangerousness standard in §51.20(1)(a)2. . The same is true for determinations imposing involuntary medication orders. Testimony from the independent examiner is typically brief, as it was in this case. It is almost always offered at the same hearing as the commitment hearing, and the order for forced medication is routinely issued the same day—before giving the respondent a chance to voluntarily take medication, and before alternatives to medication have been implemented. Too often, this smacks of a rubber stamp. Guidance from this Court is needed so that trial courts will understand and

meaningfully apply the standard set forth in §51.61(1)(g)(4). *See* Wis. Stat. §809.62(1r)(b).

Additionally, review is appropriate because a decision by this Court will help develop and clarify the law, and the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court. Wis.Stat. §809.62(1r)(c).

STATEMENT OF CASE AND FACTS

P.P. stipulated to his initial involuntary commitment. He did, however, challenge the County's request that he be kept in a locked, in-patient facility, and that the Court issue an involuntary medication order. P.P.'s appeal raised only issues related to the involuntary medication order. Accordingly, facts not relevant to the involuntary medication order will not be included.

P.P. was emergently detained on March 23, 2020. R.1. Police responded to a caller who described two men in an altercation. Police transported P.P. to Winnebago Mental Health Institute (WMHI). R.2:3.

A probable cause hearing was held on March 26, 2020. Dr. Marie Raine of WMHI testified that she had explained the advantages, disadvantages, and alternatives of psychotropic medications to P.P. She

did not identify the specific medications. She testified that the advantages would be "his not being in trouble with the law, being able to stay home, his being able to continue in the community, and the things that are bothering him would go away." R.56:11. The disadvantages the doctor described were: "side effects abnormal motor movements. That's pretty much it and… stiffness in the mouth and jaw." *Id.* Regarding alternatives, the doctor testified that, "there is no alternative to medication." *Id.*

Corporation counsel then asked Dr. Raine whether P.P. understood the conversation regarding medication. She said, "I believe he understood it, yes." R.56:12. Counsel then asked: "Do you believe he is able to apply that understanding to his current situation?" The doctor replied, "No. He thinks all he needs to do is go home and be with his son and he will be fine." Counsel: Does he appear to have any insight into his mental illness?" Doctor: "Not at this time, no." *Id.*

On cross examination, Dr. Raine stated that P.P. had been taking his medication voluntarily since his admission to WMHI. R.56:13. Counsel for P.P. established that P.P. had been incarcerated, then released approximately six months prior to the incident that gave rise to the emergency detention. Following his release, he did not have a care provider and did not have access to medication. Dr. Raine opined that he

did not seek services because he did not believe he needed medication. R.56:14. She also acknowledged that she had no information in the record or of her personal knowledge that P.P. had ever refused medication. R.56:15.

On the record provided, the trial court declined to order involuntary medication. The court stated:

> The doctor testified that he is able to understand the advantages, disadvantages, and alternatives. He was also able to tell her that in the past the medication has made the ghosts and other hallucinations go away, but for whatever reason he is making the choice he doesn't want to continue to take them. I am more comfortable with the fact he's been taking the medication while at the hospital. Certainly if he makes a choice to stop that, then the matter can be put back on for a hearing prior to the final hearing to address an order for medication, but at this point in time I am going to deny the request for involuntary medication order.

The final hearing was held on April 1, 2020. Dr. Marshall Bales testified regarding his meeting with P.P. for an examination. He testified that P.P. was prescribed Ativan, Olanzapine, Benzestrofol, and Invega. R.57:8. Asked whether the doctor discussed the advantages, disadvantages, and alternatives of the medication with P.P., Dr. Bales replied: "Well, I want to make note right away that he did not pay attention. He was distractible. He interrupted…And the most notable thing was, frankly, he did not pay attention, was focused on leaving." R.57:9.

Dr. Bales testified that he explained the advantages of the medication to P.P. in that it could lower agitation, help him sleep better, decrease paranoia, even out his mood, and generally make him feel better. Potential side effects, according to the doctor's testimony, "could include gastric intestinal, central nervous system, sedation, GI, and other side effects." *Id.* The doctor further testified that, "there were no good alternatives to these antipsychotic medications." *Id.*

On cross examination, Dr. Bales acknowledged that, since his admission to WMHI, P.P. had been taking his medications voluntarily. R.57:13-14. Dr. Bales speculated that P.P. was doing so to get out of the hospital. *Id.* at 14. P.P. had been involved in the mental health system previously, with no history of medication non-compliance. *Id.* at 15. Dr. Bales stated that the involuntary medication order was being sought to "assure compliance." *Id.* at 17.

Regarding the involuntary medication order, the trial court ruled as follows:

> It is a good thing that he's voluntarily taking his medication now. It is also a safer bet, given the fact that he does not have the best record of continuously taking his medication without an order, in my view, given the testimony that we've heard, it's appropriate to order a medication order. If he doesn't require it because he continues voluntarily to take his medication, it won't be used. But the idea that we should ignore the need for an order today and wait and see what happens in the future

> and then go through this all over again with another hearing because he's decompensated and won't take his medication, and there's no order to treat him, that adds another layer of litigation which could be avoided if I follow the testimony, the unrefuted testimony of the doctor today, that a medication order is appropriate.
> *Id.* at 30-31.

The trial court then held, "I find that [P.P.] does understand the advantages, disadvantages, and alternatives to medication. I find that he does, nonetheless, have a history of noncompliance. And although he's taken his medication recently, I'm concerned that that may not be the case in the future. And the Court is going to take it out of his hands to weigh the pros and cons, and I'm going to make a treatment order appropriate to this situation." *Id.* at 32. The trial court issued orders for involuntary commitment and involuntary medication. Ptr App. at 14,17.

P.P. appealed the involuntary medication order.[2] The court of appeals issued an unpublished decision on December 16, 2021. *Rock County v. P.P.,* 2021AP678, unpublished slip op. (December 16, 2021). The court held that P.P.'s appeal was moot.

ARGUMENT

1. **P.P.'s appeal of his involuntary medication order is not moot.**

[2] P.P. stipulated to the commitment, but not to the involuntary medication order.

The medication order that is the subject of this appeal has expired. In fact, the order expired before appointed counsel received all of the transcripts requested on June 22, 2020. See R:56 (transcript of probable cause hearing held on March 26, 2020, was filed on February 4, 2021). The record was not transmitted until May 21, 2021. R:51. Counsel for P.P. also filed motions for extensions of time. None of these delays were attributable to P.P., and he should not be penalized for them.

Standard of Review

Mootness is an issue that the court reviews de novo. *Waukesha County v. S.L.L.*, 2019 WI 66, ¶10, 387 Wis. 2d 333, 929 N.W.2d 140, *citing PRN Assocs. v. DOA,* 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559 ("Mootness is a question of law that we review independently of the determinations rendered by the circuit court and the court of appeals.")

P.P.'s appeal of his involuntary medication order is not moot due to collateral consequences of the order

The Wisconsin Supreme Court addressed the mootness issue in *Marathon Cty v. D.K.*, 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901., holding that D.K.'s appeal of his commitment was not moot because it subjected him to the firearms ban, which extended beyond the term of Addressing the holdings in *Portage Cty v. J.W.K.*, 2019 WI 54, 386 Wis.

2d 672, 927 N.W.2d 509, and *In re the Mental Commitment of Christopher S.,* 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109, the Court said:

> We have previously concluded that an expired initial commitment order is moot. Christopher S., ¶30. However, the issue of collateral consequences' effect on an otherwise moot commitment was not raised in that case. Then in *J.W.K.*, we specifically left open the question whether collateral consequences render an expired commitment not moot. We said, "Our holding that J.W.K.'s [challenge to his commitment] is moot is limited to situations where, as here, no collateral implications of the commitment order are raised." *J.W.K.*, 386 Wis. 2d 672, ¶28 n.11. We said these collateral consequences may include a firearms ban, civil claims, and costs of care. Id. And now, in this case, D.K. has raised the issue of collateral consequences.
> D.K. at ¶22.

The Wisconsin Supreme Court in *D.K.* resolved the mootness issue by holding that "D.K.'s commitment is not a moot issue because it still subjects him to a firearms ban." *D.K.* at ¶25. The Court noted that in the absence of the firearms ban, D.K. would have a fundamental right to bear arms. U.S. Const. amend II; Wis. Const. art. I, §25; *see also District of Columbia v. Heller,* 554 U.S. 570 (2008); *Wisconsin Carry, Inc. v. City of Madison,* 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233.

P.P. asserts that the involuntary medication order has significant collateral consequences that render his appeal not moot. One of the harshest collateral consequences is the stigma associated with an involuntary commitment and associated involuntary medication order. In theory, the order is confidential; however, Wis. Stat. §51.30(3) and (4) recognize over a dozen exceptions to a person's right to the confidentiality of Chapter 51 records. As the United States Supreme Court recognized in *Addington v. Texas*, 441 U.S. 418 (1979):

> [I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that that we recognize that it can occur and that it can have a very significant impact on the individual.

Id. at 425-426.

The Court in *D.K*. recognized the principle that "[t]he idea that collateral consequences can render an otherwise moot issue not moot is nothing new in Wisconsin." *D.K*. at ¶23. Further, *D.K*. specifically invoked *Sibron v. New York*, 392 U.S. 40 (1982), which holds that an appeal from a criminal conviction is never moot—even when the defendant has completed his sentence and even when the defendant has prior convictions. *Id*.

at 56. The Court in *D.K.* noted, "Of course, this is not a criminal case. But the logic of *Theoharopoulos* (holding that collateral consequences could render a challenge to a prior criminal conviction not moot) is just as sound here*." D.K.* at ¶24*, citing State v. Theoharopoulos,* 72 Wis. 2d 327, 240 N.W.2d 635 (1976).

The U.S. Supreme Court in *Sibron* noted, "We do not believe the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct." *Sibron* at 52-53. Based on this principle, P.P. argues that dismissing his appeal of the involuntary medication order as moot is inappropriate and a due process violation. If the courts, due to backlogs, inefficiencies, failure to meet statutory deadlines, or other delays unrelated to P.P.'s conduct or control, cannot timely address his appeal—he should not be penalized for it. He certainly should not be denied his statutory and constitutional right to an appeal based on these factors.

Addressing specifically the involuntary medication order, P.P. argues that such appeals should never be moot. Involuntary medication is a government intrusion into a person's

body. He therefore has a significant and constitutionally protected liberty interest in avoiding unwanted psychotropic medication. *Winnebago County v. C.S.,* 2020 WI 33, ¶30, 391 Wis. 2d 35, 940 N.W.2d 875; *State v. Scott,* 2018 WI 74, ¶44; 382 Wis. 2d 476, 914 N.W.2d 141; *Sell v. United States,* 539 U.S. 166, 177 (2003); *Washington v. Harper,* 494 U.S. 210, 229 (1990).

Psychotropic medications are, by definition, mind-altering. ("The purpose of the drugs is to alter the chemical balance in a person's brain, leading to changes, intended to be beneficial, in his or her cognitive processes." *Harper* at 229.) The drugs carry the risk of serious side effects, however—some of them fatal. Side effects can include:

- Acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes;
- akathisia;
- neuroleptic malignant syndrome (which can lead to death from cardiac dysfunction;
- tardive dyskinesia (irreversible neurological disorder causing tremors);
- impaired memory;
- cognitive impairment;
- lethargy;
- blurred vision;
- diabetes; and
- metabolic syndrome.

See Harper at 229-30; *Sell v. United States*, 539 U.S. 166, 179 (2003); and Klepner, Dina, "Sell v. United States: Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Competence," 32 *Pepperdine Law Review* 3 at 729, fn 10.

Because some of these side effects can be permanent, they are significant collateral consequences of the involuntary medication order.

Another collateral consequence is psychological trauma resulting from forced drugging. Typically, if a person refuses medication, a team of orderlies wearing protective gear and helmets administer it forcibly. They restrain the person on a gurney with four-point holds at the wrists and ankles, then pull the person's pants down and forcibly inject the medication into their posterior. Often the person is screaming, traumatizing not only themselves, but others on the unit. *See, e.g., U.S. v. Grape,* 549 F. 3d 591, 596 (3d Cir. 2008); *and Large v. Superior Court,* 148 Ariz. 229, 232, 714 P.2d 399 (Ariz. 1986).

When the involuntary medication order ends, the individual may choose to terminate use of the antipsychotic medication. He does so at his peril. The pharmacological effects of

withdrawal from antipsychotic drugs are significant, and can include:

- psychosis;
- emotional lability and instability;
- abnormal movements, including tardive dystonia or tardive akathisia;
- cognitive dysfunction, including dementia;
- gastrointestinal problems, including nausea, vomiting, anorexia, and diarrhea

Breggin, *Psychiatric Drug Withdrawal,* Springer Publishing Company (2013).

These potentially very dangerous effects will persist long after the termination of the involuntary medication order, rendering post-termination challenges to the order not moot.

Additionally, a person has a statutory right to be free from unnecessary and excessive medication. Wis. Stat. §51.61(1)(h). If the evidence in a case is insufficient to support the order, then the order was unnecessary and excessive. The person would then have a claim for violation of his or her rights under §51.61(7). The person's appeal is therefore not moot, as a decision reversing the involuntary medication order would support the claim.

For all of the foregoing reasons, P.P.'s appeal is not moot.

P.P.'s appeal is not moot because exceptions to the mootness doctrine apply.

Even in the absence of any collateral consequences, P.P.'s case is not moot. Courts will generally refrain from deciding moot cases in the absence of a compelling reason. *D.K.* ¶19. Exceptions to this general rule will be recognized when a case presents "a need for an answer that outweighs our concern for judicial economy." *S.L.L.* at ¶15. The exceptions include issues that (1) are of great public importance; (2) challenge the constitutionality of a statute; (3) for which a definitive decision is essential to guide the trial courts; (4) is likely to arise again and that should be resolved by the court to avoid uncertainty; and (5) is capable and likely of repetition and yet evades review. *See, e.g., Outagamie Cty v. Melanie L.,* 2013 WI 67, ¶80, 349 Wis. 2d 148, 833 N.W.2d 607; *J.W.K.* ¶29. *See also Langlade Cty v. D.J.W.,* 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. In *D.J.W.,* the Wisconsin Supreme Court held that the case was moot (due to the death of D.J.W. while the matter was pending), but would be decided because "the question of the necessary evidence to support an involuntary commitment is of great importance yet often avoids appellate review…Given the significant liberty interests at stake in a Chapter 51 involuntary commitment proceeding, the same considerations are attendant here." *D.J.W.* ¶26, fn 5.

Despite the holdings in *D.K.* and *D.J.W.,* counties continue to argue that Chapter 51 appeals involving expired commitments and involuntary medication orders are moot. Application of rules of "judicial economy" are completely inappropriate when weighed against the significant liberty interests at stake in a Chapter 51 proceeding.

There can be no doubt that involuntary commitment and involuntary medication cases raise issues of great public importance. Involuntary commitment results in "a massive curtailment of liberty," that is "more than a loss of freedom from confinement," but also has "adverse social" and "stigmatizing consequences." *Vitek v. Jones,* 445 U.S. 480, 491-92, 494 (1980). *See also Humphrey v. Cady,* 405 U.S. 504, 509 (1972). Courts in other states have held that appeals of civil commitments will always satisfy the public interest exception to the mootness doctrine and are therefore never The third, fourth and fifth exceptions also apply to all Chapter 51 mootness determinations (both commitments and involuntary medication orders). The mootness issue arises very frequently because the flaws inherent in the way Chapter 51 cases are handled mean that completion of appeals before the commitments expire is the exception rather than the rule. By statute, initial commitments

are limited to six months; recommitments to 12 months. Wis. Stat. §51.20(13)(g). Delays in appointing defense counsel, obtaining transcripts, and completing briefing are not uncommon. In P.P.'s case, the commitment and medication orders were issued on April 1, 2020. The Public Defender's Office was unable to appoint counsel until June 22, 2020. The initial commitment (and with it, the involuntary medication order) expired on or about November 1, 2020. The transcript of the final hearing was not filed until October 19, 2020. The transcript of the probable cause hearing was not filed until February 4, 2021. Such delays mean that mootness determinations in Chapter 51 cases will, more likely than not, evade review. *See J.W.K.* at ¶29.

This Court has held that cases challenging involuntary medication orders likely present exceptions to the mootness doctrine. *See State ex rel Jones v. Gerhardstein,* 141 Wis. 2d 710, 416 N.W.2d 883 (1987). The court held that:

> This court is now convinced the issue regarding the constitutionality of the involuntary application of drugs to mentally competent persons who have been involuntarily committed is an issue of such statewide and pressing nature that it must be decided…the case and controversy created by the nonconsensual administration of psychotropic drugs to such individuals is clearly capable of repetition, yet it evades review due to the nature of intermittent commitments of individuals.
>
> Even if the case were moot as to the named persons, however, it would qualify for consideration, in that societal treatment of involuntarily committed individuals

> is an issue of great public importance. As such, all the exceptions to mootness are sufficiently present in this case. Moreover, the state and county concede that psychotropic drugs are involuntarily given to all types of patients, so the issue arises frequently and affects a continuing class.

Jones at 725-726.

The same analysis is applicable here.

For the foregoing reasons, this Court should decide P.P.'s appeal even if it determines that the case is moot.

2. The evidence was insufficient to support the involuntary medication order, and the trial court did not base its ruling on the correct standard.

The evidence presented at P.P.'s hearing was not sufficient to meet the County's burden of proving, by clear and convincing evidence, that P.P. should be subject to an involuntary medication order. Moreover, the trial court articulated a standard for approving the order that is inconsistent with the statutory requirements for the order.

The standard for obtaining an involuntary medication order is set forth at Wis. Stat. §51.61(1)(g)(4), and provides as follows:

> For purposes of a determination under subd. 2 or 3, an individual is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and

> alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

Dr. Bales testified that he had explained the advantages and disadvantages of psychotropic medication to P.P. R.57:9. He testified that the potential side effects "can include gastric intestinal, central nervous system, sedation, GI, and other side effects." Notably, his explanation of the disadvantages did not include many of the side effects noted *supra* at 12. Bales continued, "And then I also said there were no good alternatives to these antipsychotic medications." *Id.*

Contrary to Dr. Bales' assertion, there are indeed alternatives to antipsychotic medications—some of them more effective, according to some experts, than the medications themselves. *See, e.g., State ex rel Jones v. Gerhardstein,* 141 Wis. 2d 710, 731 (1987), ("The experts stated that there are alternatives to administering psychotropic drugs, *e.g.*, psychosocial treatment, verbal psychotherapy, milieu therapy. It was apparent from the testimony that the environment to which the patient is discharged, critical, unsupportive relatives versus

supportive relatives, is generally more important for recovery than the treatment modality used at the hospital.").

Asked whether P.P. could understand the explanation, Dr. Bales responded, "Not overall. I don't think he's cognitively delayed. I don't think he is intellectually unable, but he had made comments on the unit, not to me, but that the medicine is poison, and I just overall did not think he could gradually or reasonably or competently refuse. I don't think he accepts that he has a mental illness." R.57:10. In this exchange, it is clear that counsel for the County was attempting to elicit testimony as to whether P.P. met the standard set forth in Wis. Stat. §51.61(1)(g)(4)(a). Dr. Bales' response does not meet that standard. Counsel then attempted to elicit testimony that would support a finding that P.P. met the standard at (b) by asking, "So even if he could understand, you don't —you don't believe he can apply it to his current situation?" Bales responded, "Yes." *Id.* Earlier, Dr. Bales had speculated that he "got the impression that [P.P.] was taking the doses he was taking because he had just had the probable cause, and he was taking a few doses to get out, and then he was going to do what he wanted. Historically he gets noncompliant and will not take medications voluntarily." R.57:9-10.

Dr. Bales' testimony is insufficient to meet the standard articulated in the statute. Speculation regarding medication compliance

is not adequate. Neither is a rote "yes" in response to a leading question from corporation counsel, with no articulation of facts in support of the conclusion.

As the Wisconsin Court of Appeals recently explained, "conclusory opinions parroting the statutory language without actually discussing dangerousness, are insufficient to prove dangerousness in an extension hearing." *Winnebago Cty. v. S.H.*, 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761. Although the Court in *S.H.* was discussing dangerousness, the principle is the same. Dr. Bales concluded that P.P. would be non-compliant with medication if not subject to an involuntary order, but he never provided any non-conclusory evidence-based support for his conclusion. In fact, he made incorrect statements about historical non-compliance, as demonstrated on cross examination. He was apparently unaware that no medication order was issued at the probable cause hearing (R.57:13); and he agreed on cross examination that P.P. had been taking his medication voluntarily since his admission to WMHI. R.57:14.

Even if Dr. Bales were correct that P.P. had a history of non-compliance with his medication, that is not a basis for issuing an involuntary medication order. Yet that is precisely what the trial court did. The judge found that P.P. "does understand the advantages,

disadvantages, and alternatives to medication." R.57:32. Thus, the involuntary medication order could not be issued under Wis. Stat. §51.61(1)(g)(4)(a).

The trial court continued, "I find that he does, nonetheless, have a history of medical noncompliance. And although he's taken his medications recently, I'm concerned that that may not be the case in the future. And the Court is going to take it out of his hands to weigh the pros and cons, and I'm going to make a treatment order appropriate to this situation." *Id.* This language appears nowhere in Wis. Stat. §51.61(1)(g)(4). The issue for purposes of the order is whether P.P. is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives to medication in order to make an informed choice as to whether to accept or refuse medication or treatment. Historical non-compliance is not a correct basis for issuing the order.

As noted by the Wisconsin Supreme Court, "[w]hatever the circumstances may be, the County bears the burden of proof on the issue of competency in a hearing on an involuntary medication order." *Outagamie Cty. v. Melanie L*, 2013 WI 67, ¶¶94-95, 349 Wis. 2d 148, 833 N.W.2d 607; see also *Marathon Cty v. D.K.*, 2020 WI 8, ¶¶53-54,

390 Wis. 2d 50, 937 N.W.2d 901. Rock County did not meet its burden in this case.

CONCLUSION

Trial courts in Wisconsin routinely issue involuntary medication orders concurrently with involuntary commitment orders, and they do so without applying the correct statutory standard, as was done in this case. Guidance from this Court is necessary to ensure that the significant civil liberty interest of individuals is protected when the government seeks authority to forcibly medicate them.

Dated this 17th day of January, 2022.

Elizabeth Rich

_____

Elizabeth Gamsky Rich
State Bar No. 1019123
Counsel for Respondent-Appellant-Petitioner

RICH LAW SC
435 E. Mill St., Ste 3
Plymouth, WI 53073
920.892.2449
erich@rich-law.com

CERTIFICATION AS TO FORM/LENGTH

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 the brief is 5,172 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 17th day of January, 2022.

Respectfully submitted,

Elizabeth Rich

_____

Elizabeth G. Rich
State Bar No. 1019123

RICH LAW SC
435 E. Mill St., Suite 3
Plymouth, WI 53073
920.892.2449
erich@rich-law.com
Attorney for Respondent-Appellant

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the decision of the court of appeals; (3) the findings or opinion of the circuit court; (4) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of January, 2022.

Elizabeth Rich

_____

Elizabeth G. Rich
State Bar No. 1019123

Rich Law SC
435 E. Mill St., Suite 3
Plymouth, WI 53073
920.892.2449
erich@rich-law.com