STATE OF WISCONSIN
SUPREME COURT

Case No. 2021AP1760-FT

In the Matter of the Mental Commitment of H.V.,

ROCK COUNTY,
Petitioner-Respondent,

v.

H.V.,
Respondent-Appellant-Petitioner.

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

APPEAL FROM THE COMMITMENT ORDER ENTERED IN ROCK COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY KUGLITSCH, PRESIDING

Bridget Laurent
Rock County Deputy Corporation Counsel
Attorney for Rock County
51 S. Main Street
Janesville, WI 53545
State Bar No. 1092924
(608) 757-5530

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H.V. DOES NOT SET FORTH THE CRITERIA NECESSERY FOR REVIEW TO BE GRANTED

Rock County opposes the Petition for Review filed by H.V. because it does not set forth criteria which warrants review under Wis. Stat. §809.62(1r). H.V.'s petition attempts to extend a case specific challenge to fit several criteria, however, H.V.'s appeal is fact dependent, related to the trial court's consideration of expert testimony at a re-commitment hearing and the appellate court's refusal to extend the Plain Error Doctrine to any issue H.V. forfeited at the trial court level. Given the circumstances of this case, H.V.'s issues do not rise to the level warranting Supreme Court review.

H.V. argues the Court should take up this matter as it raises a novel issue: the consideration of evidence admitted through an expert without objection. This issue has already been reviewed in the context of involuntary civil commitments (See *In the matter of the condition of S.Y.*, 162 Wis.2d 320, 469 N.W.2d 836 (Wis. 1991)) as has the remedy appropriate for when adversary counsel fails to make timely objections. (See *Winnebago County v. J.M.*, 2018 WI 37, 381 Wis. 2d 28, 911 N.W.2d 41 - the standard for an individual in a civil commitment proceeding to challenge the effectiveness of their counsel is the same as in any other matter.) To maintain judicial efficiency, it is the duty of adversary counsel to effectively

advocate for their client by making timely objections rather than avoid making objections and creating an appealable issue.

H.V.'s sufficiency of the evidence issue was resolved on its merits by the court of appeals. The court of appeals addressed all issues raised by H.V.'s appellate brief and applied the appropriate standard. H.V.'s appeal is not an issue which evades review; it is an issue which was reviewed by the court of appeals and resolved in a manner contrary to H.V.'s wishes.

H.V. also argues the Court should take up this matter to explicitly state the due process rights afforded to individuals in civil commitments. This is not necessary as the rights of involuntarily committed individuals are already codified in Wisconsin Chapter 51 (See Wis. Stat. §§51.20(5)(a), (11), (13)(g), 51.61) and supported by existing case law.

In addition, the commitment of H.V. was extended in February 2022 and the appealed order is expired. The burden of proof is the same for each extension as it is for an original commitment. Review of this issue will have no practicable impact on any matter including H.V.'s. The case at hand presents no compelling reason for Supreme Court review.

The Petition for Review should be denied

STATEMENT OF CASE

H.V.[1] was detained in April 2014 based on a Petition for Examination under Wis. Stat. §51.20(1)(a)2.e. (R.139) In support of that petition, a report of examination was completed which detailed H.V.'s extensive mental health treatment history and the concerns of his treatment providers and family. (R.138) Since that time, H.V. has consistently been under a commitment order.

In January 2021, the County petitioned for an extension of H.V.'s commitment submitting a report of examination by Dr. Leslie Taylor in support of the petition. (R.187; 188) Adversary counsel was appointed to H.V. on January 13, 2021. (R.189) A recommitment hearing was held on February 17, after a short continuance granted at H.V.'s request. (R.192; 197) H.V. did not appear at the recommitment hearing, appearing by his appointed counsel. (R.197)

The sole witness to testify was Dr. Taylor, who had examined H.V. for a third time. (R.129; 173; 187) Dr. Taylor discussed her 2021 and 2020 meetings with H.V. (R.207:9) The report of examiner was admitted into evidence after testimony without objection. (R.207:14) H.V. called no witnesses. H.V. made no objections during testimony. The trial judge noted

1 Due to the confidential nature of this matter, the Appellant is referred to as H.V. throughout.

he remembered H.V. from previous hearings (R.207:27) and found that H.V. suffers from a treatable mental illness, is a proper subject for treatment, and is a danger to himself or others under the third standard through the recommitment standard if treatment were withdrawn. *Id*. The trial court relied heavily on Dr. Taylor's strong professional opinion of H.V.'s future dangerousness in making its ultimate decision. (R.207:28)

H.V. appealed his February 2021 commitment order which was fast-tracked and decided prior to the expiration of the 2021 order. (See *Rock County v. H.V.,* 2021AP1760-FT.) The Court of Appeals affirmed the 2021 order after deciding the issues on their merits. *Id.*

The County petitioned for recommitment of H.V. in January 2022. A recommitment hearing was held in February. Again, the trial court found H.V. is mentally ill, a proper subject for treatment, and dangerous – once more committing H.V. for a period of 12 months. (Appendix 101-102).

ARGUMENT

I. The Expiration of the 2021 Recommitment Order Renders This Matter Moot.

Mootness is a doctrine of judicial restraint and a question of law which is reviewed independently. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559. An issue is moot when a determination is sought on some matter which, when rendered, cannot have any practical legal effect upon a then-existing controversy (*State v. Leitner*, 2002 WI 77 ¶ 13, 253 Wis. 2d 449, 646 N.W.2d 341) or, stated otherwise, when its resolution will have no practical effect on the underlying controversy. *Portage County v. J.W.K.,* 2019 WI 54, 386 Wis.2d 672, 927 N.W2d 509.

Not all expired orders are necessarily moot. There are several reasons the Court may determine it is appropriate to decide an issue despite its apparent mootness such as the five exceptions to mootness outlined in *Outagamie Co v. Melanie L.*, (349 Wis.2d 148, 833 N.W.2d 607) or the existence of pressing collateral consequences such as in *Langlade Co v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. H.V. acknowledges the expired 2021 commitment order renders his issue moot, yet, asks the Court to take up review. No reason to overlook the mootness of H.V.'s issue applies in this matter.

H.V. argues the collateral consequences of his expired commitment order are enough to override the mootness of the issue much like the matter described *In re the Matter of D.K.,* 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901. However, H.V.'s commitment has been extended multiple times; there is no causal connection nor any independent collateral consequences stemming from the 2021 extension which do not also exist from the other commitment orders. *Id.,* ¶24.

Or H.V. argues this matter presents a live controversy because H.V.'s commitment has been extended multiple times and may be extended again in the future using the same evidence of past violence, however, as the court of appeals noted, this "misconstrues the basis for recommitment. H.V. was not recommitted solely because of past behavior or present delusions but because of Taylor's informed prediction." *H.V. supra,* ¶31. As the Court explained in *J.W.K.*, each recommitment requires a new hearing and cannot rest on mental illness alone. *Portage County v. J.W.K.*, ¶24. Each commitment period requires the same safeguards and level of proof as orders before it.

Finally, H.V. argues the appellate process cannot be completed in time to have a practical effect on the patient and therefore is a matter of great public importance which evades review. That a civil commitment cannot complete

appellate review in a timely manner is blatantly untrue. Despite a seven month delay at the outset, this matter was investigated, briefed, and decided before the 12 month extension expired by using a fast-track appeal. (See *Rock Co. v. H.V.*, *supra.*) This case was not more complicated or special than what would be required for a typical commitment appeal.

H.V.'s issue is a fact-specific request for review of his expired recommitment order. The due process requirements, appropriate processes for review, and remedies for all the issues raised by H.V. already exist. H.V.'s expired order is a moot fact-specific issue for which review will not add anything to existing law.

II. The Court of Appeals Appropriately Declined to Apply Plain Error Analysis in This Matter.

Plain error is error so fundamental, obvious, and substantial that a new trial or other similar relief must be granted even though the incident was not objected to at the time. *State v. Jorgensen* 2008 WI 60, ¶23, 310 Wis.2d 138, 754 N.W.2d 77. Courts use the plain error doctrine sparingly. *Id.* ¶21. In this matter, the application of the plain error doctrine is not appropriate because H.V. forfeited any hearsay challenge to the testimony and report by failing to raise the issue before the trial court and any error which may have occurred in the circuit court's findings and

determination was not so substantial, obvious, and fundamental as to require a new trial or other similar remedy.

A. H.V. forfeited any hearsay challenge by not objecting at the time of the circuit court hearing.

Generally a failure to object constitutes a forfeiture of the right on appellate review. *State v. Ndina*, 2009 WI 21, ¶31, 315 Wis.2d 653, 761 N.W.2d 612 (2009). While there are exceptions, the forfeiture rule's purpose is to allow the circuit court to correct any error as it comes up with minimum disruption and maximum efficiency. *State v. Counihan*, 2020 WI 12, ¶12, 390 Wis.2d 172, 938 N.W.2d 530 (2020). Timely objections may obviate the need for an appeal and the forfeiture rule prevents attorneys from using, as a tactic, the strategic decision to not object to an error only to later claim the error is grounds for a harsh remedy when the error could have been resolved in the moment. *Id* ¶26-27.

The plain error doctrine recognized by Wis. Stat. §901.03(4) allows the court of appeals to review errors that were otherwise forfeited by a party's failure to object and must be so obvious, substantial, and fundamental that a full new trial must be granted. *State v. Jorgensen*, *supra*, ¶21. A high bar exists to overcome the forfeiture rule. An error may be, but is not necessarily, plain when it rises to the level of infringing on the constitutional rights of an individual.

Virgil v. State, 84 Wis.2d 166, 195, 267 N.W.2d 852 (1978). Wisconsin has long used the constitutional error standard as a tool for when the plain error doctrine should be used. *State v. King*, 205 Wis.2d 81, 91, 555 N.W.2d 189 (Ct.App.1996).

While due process violations have been the basis for the use of the plain error doctrine, Wisconsin has also recognized due process rights are different, more flexible, in civil commitments than they are in criminal matters (*In the Matter of Parham*, 95 Wis. 2d 21, 289 N.W.2d 326 (Ct. App. 1979)) and that rights, even constitutionally held rights, may be waived or forfeited, if not exercised. *Waukesha County v. S.L.L.*, 2019 WI 66, ¶34, 387 Wis. 2d 333, 929 N.W.2d 140. The due process rights afforded to an individual during involuntary commitment hearings are codified in Wisconsin Chapter 51 (See Wis. Stat. §51.20(5)(a), (9)(a)2., (10)(a), (11)).

H.V. argues his due process right to confrontation was violated when an expert testified to the basis of her professional opinion. H.V. did not object in the moment and the failure to object should be viewed as a waiver of the right and a forfeiture of the issue, not a due process violation. H.V.'s issue is similar to *State v. Nelson,* 2021 WI App 2, 395 Wis.2d 585, 954 N.W.2d 11. In *Nelson*, like the matter at hand, adversary counsel did not object to the alleged hearsay evidence in the medical expert's testimony or

report despite having access to the report prior to the trial. *Id*. The court of appeals determined that extending the plain error doctrine was not appropriate in that matter (*Id.* ¶61) and this Court denied to review the issue in March 2021. The right to due process does not encompass the right to a trial free from un-objected to error. *United States v. Hasting*, 461 U.S. 499, 508-509 (1983). As the court of appeals correctly noted, "H.V. cannot be said to have been denied his procedural due process right to question witnesses when he both questioned Taylor and did not raise a hearsay objection."

Despite H.V.'s impassioned plea, applying the plain error doctrine as H.V. requests would allow an individual to use evidence to their advantage without objection and then claim "plain error" if ultimately there is an adverse decision though there may have been a strategic reason not to object. In this matter, adversary counsel used aspects of the expert's report and testimony during cross examination and final argument and pressed the expert on aspects of her report without ultimately objecting to the circuit court receiving any aspect of the report or testimony. It is plausible not objecting was a strategic choice made by adversary counsel, not error, and, as such, should be deemed a forfeited issue.

B. The trial court committed no error in relying on the testimony and report of the examiner.

Though Wis. Stat. §907.03 is not a hearsay exception and does not make hearsay admissible, experts may testify to their opinions even if the expert has relied on inadmissible hearsay in arriving at the opinion, as long as the hearsay is the type reasonably relied on by experts in the particular field in forming opinions on the subject. *Staskal v. Symons Corp*, 2005 WI App 216, ¶22, 287 Wis. 2d 511, 706 N.W.2d 311. It is well established that medical experts may rely on the reports and medical records of others in forming opinions that are within the scope of their own expertise. *Enea v. Linn*, 2002 WI App 185, 256 Wis. 2d 714, 650 N.W.2d 315. The experts are then permitted, sometimes required, to share that opinion and its basis with the finder of fact. Wis. Stat. §51.20(9); Wis. Stat. §907.05; *Staskal,* ¶22.

A properly qualified expert witness may rely on inadmissible material because a testifying expert is not required to personally make all the observations relevant to the expert's opinion. *State v. Heine*, 2014 WI App 32, ¶12, 354 Wis. 2d 1, 844 N.W.2d 409. A medical expert giving opinion testimony has a different role than the fact finder in that an expert testifies to facts and opinions and the fact finder makes legal judgments as to whether the evidence admitted

meets the legal standard. *In re the matter of D.K.,* 2020 WI 8*, concurrence* ¶68-69, 390 Wis.2d 50, 937 N.W.2d 901.

This matter was tried to the court, not to a jury. (R.207) It is the trial court's responsibility to determine, among other things, whether testimony is admissible or should be excluded. The trial court heard the direct and cross examination of the expert on matters contained within the statutorily required report. *Id*. While hearsay cannot form the basis for the trial court's final decision, the trial court may rely on the opinions of experts. *Staskal,* ¶22. The expert may testify in terms of opinions and give the reasons without disclosing the underlying facts under Wis. Stat. § 907.05, but may be required to disclose such on cross-examination or if the judge requires.

In this matter, Dr. Taylor personally examined H.V., albeit very briefly, and formed professional opinions based on her 2021, and previous, interactions with him along with his treatment records. The doctor relied on her recent and historic observations and extensive documentation to form opinions in this matter. (R.187) Dr. Taylor explained she had met with H.V. previously, including immediately after his 2014 detention and in 2020, during which she met with him personally. (R.207:4) Unlike in other similar cases, there was no indication from H.V. that any information should not

be considered by the circuit court during the testimony or in the expert's report. (See *S.Y. v. Eau Claire County.*, 156 Wis. 2d 317, 327-28, 457 N.W.2d 326 (Ct. App. 1990); unlike in this matter, there was a timely objection in *S.Y.*) The trial court's receipt of the expert's personal observations and professional opinions was not in error nor was the trial court's use of such in the findings and final determination.

C. Even if there was an error, the error was harmless.

Even if it was an error for the judge to consider some aspects of the expert's testimony and report, other evidence supports the finding of dangerousness including the weight trial court gave the expert's opinion and the trial judge's personal knowledge of H.V.'s case history making any error not "substantial" for purposes of the plain error doctrine.

H.V. has failed to show any error which may have occurred during the 2021 re-commitment hearing was substantial, obvious, and fundamental to the level required by the plain error doctrine. The bar to overcome the forfeiture rule and instead impose the plain error doctrine is high. *State v. Jorgensen*, *supra* ¶21. The proposed error in H.V. is not similar in scope to other situations in which the plain error doctrine has been applied. For example, in *Jorgensen*, the judge and prosecutor acted as witnesses in front of a jury through a transcript read by the same judge. *Id.* ¶7. This was

egregious and obviously erroneously admitted evidence which should never have made it to the jury's attention.

Such was not the case for H.V.; the expert appropriately relied on collateral resources to complete her examination of H.V. along with personal observations. (R.187) The examiner then relayed her observations, opinions, and the bases as required to the judge who acted as fact finder in this matter. The expert was challenged on her report and testimony through cross examination. (R.207) The judge did not rely on the now challenged testimony of historic acts alone to find dangerousness; the expert's informed prediction of future dangerousness based on H.V.'s treatment history held substantial weight for the trial court. (R.207:28) H.V. fails to show how any error rises to the level of "substantial, obvious, and fundamental" as required by the plain error doctrine to overcome the forfeiture rule.

On appeal, H.V. completely disregards the opinion, rather than treatment record based, testimony of the expert. The circuit court found H.V. dangerous to himself or others should treatment be withdrawn based on the professional opinion of a qualified expert and H.V.'s own prior statements. (*Id.*) Here, there was sufficient testimony and evidence available for the trial court to find H.V. dangerous such that any error was harmless.

D. The appropriate remedy for failure to object should be an ineffective assistance of counsel proceeding not use of the plain error doctrine.

H.V.'s petition for review notes the difficulty appellate lawyers face in having to determine whether to file a motion for ineffective assistance of counsel or an appeal requesting a plain error review in civil commitment matters. Allowing for the expansion of the plain error doctrine as suggested by H.V. allows adversary counsel to strategically decide not to object to evidence in order to create an appealable issue if the matter looks like it will be determined in an undesirable manner without the insight of a *Machner* hearing. (See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)) Individuals in civil commitment matters have a right to the effective assistance of counsel; the test for effective assistance is the same in involuntary civil commitments as it is in other matters. *Winnebago County v. J.M.*, 2018 WI 37, 381 Wis. 2d 28, 911 N.W.2d 41.

Though H.V. laments the difficulty in completing an ineffective assistance of counsel proceeding, that is the appropriate remedy for situations when adversary counsel does not effectively represent an individual. Given the issues raised in this matter, the appropriate pathway should be to initiate an ineffective assistance of counsel proceeding

rather than expand the plain error doctrine and increase the appellate courts' caseloads from counsel's possibly strategic decision not to object to testimony.

H.V. was represented by adversary counsel who cross examined the expert on her report and lack of personal meeting in 2021. H.V. declined to appear at the hearing where he could have testified as a witness to counteract the expert testimony; he could have objected to testimony or the report or presented additional witnesses or evidence, if he so chose. Individuals subject to an involuntary commitment action have the right to effective assistance of counsel and, if that does not occur, as this Court has previously stated, the use of ineffective assistance of counsel is an appropriate resolution, not a plain error review.

III. The Court of Appeals Applied the Appropriate Evidentiary Standard to the Evidence Presented at the Recommitment Hearing.

H.V. claims the trial court and the court of appeals inappropriately applied the recommitment standard described in Wis. Stat. §51.20(1)(am) and *Langlade County v. D.J.W*. It is H.V., however, who inaccurately recites the recommitment standard. H.V. argues the County was required to show a pattern of acts or omissions to show H.V. was dangerous under Wis. Stat. §51.20(1)(a)2.c through the lens of Wis. Stat.

§51.20(1)(am) during the recommitment hearing then awkwardly edits the language of Wis. Stat. §51.20(1)(am) to force an interpretation not supported by the statute or case law: that the County had to prove H.V. was currently dangerous by proving a pattern of acts that are yet to come. This is not the correct reading of Wis. Stat. §51.20(1)(am).

Wis. Stat. §51.20(1)(am) states (as edited to be relevant only to the third standard at issue here):

> "... if the individual has been the subject of outpatient treatment for mental illness... immediately prior to commencement of the proceedings as a result of a commitment ordered by a court under this section...the requirements of a...**pattern of recent acts or omissions under par. (a) 2. c**. ... **may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn**."

The recommitment standard clearly anticipates individuals who are receiving treatment immediately prior to a recommitment hearing, as H.V. was, may not act in the same manner as they would without treatment. In *Portage County v. J.W.K*, the Court clarified that to comport with due process, the trial court

must find the individual currently dangerous before ordering a recommitment (*supra,* ¶24) and *Langlade County v. D.J.W.* further explained the trial court must tie the recommitment standard (Wis. Stat. §51.20(1)(am)) to a specific sub-standard to prove current dangerousness at each recommitment hearing. *D.J.W.*, ¶40. The recommitment standard is an alternative pathway to prove current dangerousness in the absence of recent acts due to treatment. *J.W.K.*, ¶19.

The court of appeals appropriately stated the third dangerousness standard when tied to the recommitment standard: "the County had to present clear and convincing evidence that if treatment were withdrawn, H.V. would evidence such impaired judgment that a substantial probability of physical impairment or injury to himself or others would result." This is what the County had to, and did, prove to show current dangerousness. The trial court and court of appeals applied the appropriate interpretation in this matter.

CONCLUSION

The court of appeals appropriately reviewed H.V.'s 2021 re-commitment and determined not to extend the plain error rule to the issue in this matter. The court of appeals correctly decided H.V.'s appeal, which was a fact-specific issue determined, on the merits. The Petition for Review should be denied.

Dated this 28th day of February, 2022.

Respectfully submitted,

Bridget Laurent
Deputy Corporation Counsel
Rock County Department of Human Services
51 S. Main Street
Janesville, WI 53545
(608) 757-5532
State Bar No. 1092924

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) as modified by the court's order for a brief produced with a monospaced font. The length of this brief from Statement of the Case through Conclusion is 17 pages.

Dated this 28th day of February, 2022.

Bridget Laurent
Deputy Corporation Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

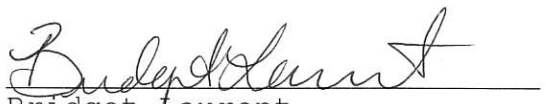
I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of §809.19(12). The appendix was also filed electronically. I further certify that:

This electronic brief and appendix are 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 28th day of February, 2022.



Bridget Laurent
Deputy Corporation Counsel
51 S. Main Street
Janesville, WI 53545
(608) 757-5532
bridget.laurent@co.rock.wi.us
State Bar No. 1092924

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stats. §809.19(2) and that contains: (1) a table of contents; and (2) relevant trial court record entries.

I further certify that if the record is required by law to be confidential, the portions of the records included in the appendix are reproduced using only the initials of the subject to whom this appeal pertains, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

This appendix is also electronically filed.

Dated this 28th day of February, 2022.

Bridget Laurent
Deputy Corporation Counsel
51 S. Main Street
Janesville, WI 53545
(608) 757-5532
bridget.laurent@co.rock.wi.us
State Bar No. 1092924