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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP603

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In the matter of the mental commitment of L.A.T.:
KENOSHA COUNTY,

Petitioner-Respondent,

v.

L.A.T.,

Respondent-Appellant-Petitioner.

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# SUPPLEMENTAL PETITION FOR REVIEW

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## ISSUE PRESENTED

1. Whether a circuit court must conduct a colloquy before accepting a stipulation to a commitment and involuntary medication order, and, if so, then whether Lauren's[1] stipulation was knowing, intelligent and voluntary?

The court of appeals held that a circuit court is not required to conduct a colloquy before accepting a stipulation to a commitment and an involuntary medication order. The court of appeals further held that the colloquy in Lauren's case was adequate.

## CRITERIA FOR REVIEW

The supreme court should grant review because a decision on the issue for review will help develop and clarify Wisconsin law. The issue is a novel, recurring question of law, and its resolution will have statewide impact. Wis. Stat. §809.62(1r)(c).

When a county petitions for an involuntary commitment and involuntary medication or treatment, the subject has a right to a hearing along with a host of 14th Amendment and statutory rights. One statutory right is the right to counsel. Wis. Stats. §51.20(5)(a).

Over 30 years ago, the supreme court established that the subject of a commitment

[1] Pursuant to §809.19(1)(g), this petition refers to L.A.T. by the pseudonym "Lauren."

proceeding may waive his right to counsel. *S.Y. v. Eau Claire County*, 162 Wis. 2d 320, 328, 469 N.W.2d 836 (1991). The person is presumed competent to waive this right under §51.59(1). However, when deciding whether to allow the person to proceed pro se, the circuit court must apply the two-part test used in criminal cases. *Id.,* 162 Wis. 2d at 336-337 (citing *Pickens v. State,* 96 Wis. 2d 549, 563-564, 568-569, 292 N.W.2d 601 (1980)). The first part of the test requires the circuit court to determine whether the person's waiver of counsel is knowing, intelligent, and voluntary. *Id.*, 162 Wis. 2d at 336.

The supreme court has not yet decided whether a person may stipulate to a commitment and involuntary medication and, if so, the procedure for determining whether the stipulation is knowing, intelligent, and voluntary. The supreme court previously granted review on this question, but then dismissed the case before issuing a decision.

Specifically, in 2005, the supreme court heard argument on the question of whether a person's constitutional right to due process was violated "when the circuit court accepted a stipulation that grounds existed for an involuntary mental commitment under ch. 51 without conducting a colloquy to ensure a knowing, intelligent, and voluntary agreement to the commitment." *Sauk County v. Aaron J.J.*, 2005 WI 162, ¶1, 286 Wis. 2d 376, 706 N.W.2d 659. The supreme court then held that review was improvidently granted because the parties' briefs failed to address matters essential to the resolution of the case.

After *Aaron J.J.,* the issue has continued to recur. For example, in 2018 the court of appeals rejected a no-merit report in an appeal where defense counsel argued that there was no meritorious challenge to a stipulation to extend a commitment because counsel stated the stipulation on the record, the person signed the stipulation, and the examiner's reports provided grounds for involuntary commitment and treatment. *Dane County v. N.W.*, Appeal No. 2018AP688-NM, 2018 WL 11431364 (Wis. Ct. App. Oct. 9, 2018)(unpublished)(App.46). The court of appeals held that appellate counsel failed to "cite any authority providing that the subject of involuntary commitment proceedings does not have a due process right to a personal colloquy to establish that a stipulation to extend an involuntary commitment is knowing, intelligent, and voluntary." *Id*. at *1.

In 2019, the court of appeals issued *Dane County v. N.W.,* 2019 WI App. 54, ¶1, 388 Wis. 2d 623, 935 N.W.2d 562 (unpublished), which holds that a circuit court is not required to conduct a personal colloquy before accepting a person's stipulation to an extension of an involuntary commitment. (App.42). In this case, the person received a written form called "Waiver of Recommitment Trial on Extension of Commitment." The person initialed each of the rights he was giving up: the right to select a court-appointed doctor and to ask the court to appoint an additional examiner; the right to cross-examine the county's witnesses, the right to attend the trial, remain silent, and/or testify, and present evidence; the right to subpoena witnesses to testify at trial; and the right to make the county prove the three elements for a commitment by clear and convincing evidence. *Id.,* at ¶3.

The person also signed a statement saying:

> I have reviewed and understand this entire document, the proposed orders, and treatment conditions. I am asking this court to accept this waiver and waive my appearance at any court proceeding in this case. In doing so, I understand that the court will order that my commitment be extended for 12 months on an outpatient basis with treatment conditions. I further understand that the court may order me to take medication regardless of my consent. *Id.*, ¶3.

The person's attorney also signed the form saying that he discussed the document with the person. The person understood it and made the waiver freely and voluntarily. *Id.*

In 2021, the court of appeals addressed a no-merit report filed in an appeal from the extension of an involuntary commitment order and an involuntary medication order. The proceeding included a stipulated 30-day extension to allow an out-of-county judge to conduct the final hearing. In affirming the orders, the court of appeals, citing *N.W.*, held: "No arguable basis exists to challenge the stipulation. Parties to a recommitment proceeding may stipulate to extension of the commitment." *Outagamie County v. C.J.A.*, 2021 WL 8649402 at *3 (Wis. Ct. App. 2021)(unpublished)(App.49).

Two years later, relying heavily on *N.W.* and *S.Y.*, the court of appeals issued the unpublished decision in Lauren's case, which holds that: (1) circuit courts are not required to conduct a colloquy to determine whether a stipulation to a commitment and involuntary medication is knowing, intelligent, and

voluntary; and (2) the colloquy here was adequate. In Lauren's case there was no "Waiver of Commitment Trial" listing each of the rights being waived, no signed statement indicating that Lauren reviewed any proposed orders or understood the treatment conditions. There was no statement by her lawyer that they discussed these matters and all her rights, that she understood them, and that she waived them.

As explained below, a stipulation to a commitment and involuntary medication can involve, and in this case did involve, a person declared incompetent to exercise informed consent. Lauren waived significant statutory and constitutional rights without a colloquy demonstrating that she knew what rights she had and that she was waiving them. According to the court of appeals, "***many persons*** . . . stipulate to the entry of both orders for commitment/recommitment and for involuntary medication." (Opinion, ¶17; App.10). (Emphasis supplied). This underscores the need for the supreme court to grant review and address the issues left unresolved in *Aaron J.J.*

## STATEMENT OF FACTS

After Kenosha County petitioned for an initial commitment and involuntary medication order for Lauren, the circuit court began to conduct a jury trial where the County planned to call 7 witnesses, and the defense planned to call one. (R.52:21).

The County' first two witnesses were Lauren's father and Dr. Sangita Patel, the psychiatrist who examined Lauren. After Dr. Patel's testimony, the

court broke for lunch. When the parties returned, they told the court that they had reached a possible stipulation.

> The Court: Good afternoon. We are here to continue the jury trial that we started this morning. Are the parties prepared to proceed?
>
> Mr. Perz: Yes.
>
> Mr. Rolf: Yes.
>
> The Court: Okay. Are there any stipulations before we proceed?
>
> Mr. Perz: It's my understanding over the lunch hour that Lauren may be willing to stipulate to the commitment and medication order.
>
> The Court: Attorney Rolf?
>
> Mr. Rolf: That is my understanding at this moment, Your Honor.
>
> The Court: Lauren, did you hear what your attorney has stated?
>
> Lauren: I did.
>
> The Court: Is that the case?
>
> Lauren: I would -- yes, it is. I would like to see it on paper what the stipulation is. The medication is.
>
> The Court: I can't understand you. If you would just –
>
> Lauren: If I could just see it on paper what -- what the stipulation is.

The Court: Well, the stipu -- a stipulation is agreeing to the -- to the request. What's being requested here.

Mr. Perz: There would be a written order that would be provided to Lauren that has the -- the terms on it.

The Court: You mean the treatment conditions designated by the Kenosha Human Development Services?

Mr. Perz: Well, that and the order itself that says –

The Court: Oh, yeah.

Mr. Perz: -- this is a six-month commitment.

The Court: I just don't have that until I -- if -- if -- until I order that I don't have it in writing to give you. I can give it to you shortly thereafter, but the stipulation is to the six-month commitment and then to the medication order.

Lauren: Okay. Does this that's my understanding too, but what is it? What does it mean? What medication and –

The Court: Well, I -- you don't want me making the determination of what medication because I am trained in the law and not any type of medicine and not that. You wouldn't want me making that decision. It's the doctors and then if you -- you need to communicate with the doctors if you're on something and it's causing problems or something along those lines. You just have to communicate that and they can perhaps try different dosages or different types of medication. That's for those professionals to make the determination about. Not for any of us as legal

professionals 'cause we're not medical or psychiatric professionals.

Lauren: I understand that.

The Court: Yeah.

Lauren: Yeah.

The Court: You wouldn't want us to do your open-heart surgery.

Lauren: No. No.

The Court: You wouldn't want us to do any of that type of stuff. Only the law stuff.

Lauren: Yes. I agree.

The Court: Okay?

Lauren: No, I wasn't -- I wasn't asking. Just was told it what it is so I can see it on paper.

The Court: Okay. I can -- I can give you a copy of that after I make the orders if you are in fact want to agree to it and then and I can give you a copy of that after. That wouldn't be a problem.

Lauren: Okay.

The Court: Okay?

Lauren: So -- so my question still is about the medication. What's required about the medications?

The Court: Well, the medication order would be that it would be a vol -- involuntary medication order which you could be administered medication without your consent. Not that it's a mandate, but you could be. It's always up to doctors and -- and

> communicating with the doctors on your part to get to that point because again I'm not the -- not the medical professional. Yeah.
>
> Mr. Rolf: If I may just have a few seconds?
>
> The Court: Sure. Absolutely. (An off the record discussion was held).
>
> The Court: Attorney Rolf, did you have an opportunity –
>
> Mr. Rolf: Yes.
>
> The Court: -- to have whatever discussion you wanted with Lauren?
>
> Mr. Rolf: I did, Your Honor. Yes.
>
> The Court: Lauren, did you have enough time to get whatever questions you had answered by Attorney Rolf?
>
> Lauren: I did.
>
> The Court: Okay. And based on that discussion what is the position of Lauren, Attorney Rolf? Or -- or Lauren? Are you agreeing to the six-month commitment with the involuntary medication order if it's need -- if that could be used if needed?
>
> Lauren: I think. Yes.
>
> Mr. Rolf: She says yes, Your Honor. (R.52:126-130; App.30-34).

Based on the stipulation and the testimony presented up to that point, the court ordered a 6-month initial commitment and involuntary medication. (R.52:130-131; App.34-35; R.36, 38;

App.25-27). It also imposed a firearm ban. (R.37; App.28).

Next, the circuit court addressed Lauren's ability to make medication and treatment decisions for herself. It held that Dr. Patel explained the advantages, disadvantages and alternatives to her. However, due to her mental illness, Lauren "lack[s] competency to refuse psychotropic medication or treatment because of the substantial incapability of applying an understanding of the advantages, disadvantages and alternatives to her condition in order to make an informed choice whether to accept or refuse psychotropic medication." (R.52:132; App.36).

Lauren appealed and raised three issues: (1) whether a circuit court must conduct a colloquy before accepting a stipulation to a commitment and involuntary medication order and whether her stipulation was knowing, intelligent and voluntary; (2) whether the County's evidence of her alleged dangerousness was sufficient; and (3) whether the circuit court complied with *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277.

Regarding the question presented in this petition, the court of appeals first held that circuit courts are not required to conduct colloquies to determine whether a person is knowingly, intelligently, and voluntarily stipulating to a commitment. (Opinion ¶¶14-16; App.9-10) (citing *Dane County v. N.W.,* 2019 WI App. 54, 388 Wis. 2d 623, 935 N.W.2d 562 (unpublished)).

The court of appeals explained that the subject of a commitment proceeding is presumed to be

competent under §51.59(1), *S.Y.* and *Lessard v. Schmidt*, 349 F. Supp. 1078,1101 n.33 (E.D. Wis.), *vacated on other grounds*, 414 U.S. 473 (1974). (Opinion, ¶16; App.10).

Without citation to authority, the court of appeals reasoned:

> Not only is the lack of a mandatory colloquy in WIS. STAT. ch. 51 cases supported by case law, but it is also supported by practice and reality. Many persons in need speak with their counsel before a recommitment (or even initial commitment) and waive their rights to contest the petition, waive their right to appear in person (or by zoom or telephone), and stipulate to the entry of both orders for commitment/recommitment and for involuntary medication. That information is relayed to the trial court by letter and then affirmed on the record by counsel. This is done for many reasons, not the least of which is that some individuals find appearances in court to be traumatic or too stressful or they agree that the supervision of the county and the administration of medications has been helpful in allowing them to remain in the community, a group home, or even inpatient placement.
>
> That being the case, it would be harmful to these individuals to require them to appear in court to undergo a colloquy before the trial court could accept their stipulation. This bolsters a conclusion that there should not be a bright-line mandatory colloquy rule in civil commitments. Moreover, when the individual is present in court and the trial court has the ability to conduct such a colloquy, some flexibility has to be permitted. People subject to civil commitment proceedings run the gamut from being able to verbally express

> themselves clearly to having disabilities that impair their speech; but they may still be able to express their choices. In addition, there may often be nervousness and possible agitation that could lead to the "logical tension" discussed in *S.Y.*, 162 Wis. 2d at 333. Even so, that presumption of competence exists, and there is no basis in law or in practice to require colloquies in all civil commitment cases. Since there was a colloquy with L.A.T., it can be reviewed by this court. (Opinion, ¶¶17-18; App.10-11).

Next the court of appeals analyzed the "colloquy" in Lauren's case. It acknowledged that the circuit court was "a bit flippant and engaged in inappropriate joking banter" and "casual byplay but it was not excessive." It showed the court was treating Lauren with a kind and friendly demeanor as it did with the jurors. (Opinion, ¶19; App.11).

The court of appeals held that "it is evident that the trial court conducted a thorough and sufficient colloquy with [Lauren] about the stipulation. [Lauren] has failed to rebut the statutory presumption that she was competent to consider the options available to her, to review and analyze how the trial had gone that morning, and whether she could stipulate to the two orders (for commitment and involuntary administration of medication). It was her burden to overcome that presumption because the County had established the basic facts." (Opinion, ¶22; App.13) (citing *State v. Kummer*, 100 Wis. 2d 220, 228, 301 N.W.2d 240 (1981)). The court of appeals declared Lauren's stipulation to both orders knowing, intelligent, and voluntary. (Opinion, ¶22-23; App.13-14).

After the court of appeals issued its decision, Lauren's appellate lawyer withdrew. The State Public Defender reassigned the case to the undersigned counsel for the preparation of a petition for review. [2]

## ARGUMENT

### I. In a Chapter 51 proceeding, the supreme court requires a knowing, intelligent and voluntary waiver of the person's statutory right to counsel.

A person undergoing a Chapter 51 commitment has a statutory right to counsel and a constitutional right to represent herself. Wis. Stat. §51.60 and §51.20(3); Wis. Const. Art. 1, §21(2). If the person wishes to waive her right to counsel, the circuit court begins with the presumption that she is competent to do so. *See S.Y.,* 162 Wis. 2d 334; Wis. Stat. §51.59(1).

The circuit court then determines whether the person's waiver of counsel is knowing, intelligent, and voluntary by applying the test used in *Pickens*, a criminal case. *S.Y.*, 162 Wis. 2d at 334-337. *Picken*s held that a person's waiver of the right to counsel is knowing and voluntary, if the record shows that she made a deliberate choice to proceed without counsel and that she was subjectively aware of the difficulties and disadvantages of proceeding pro se, the seriousness of the charges she was facing, and the

[2] As noted in the Motion for Leave to File a Supplemental Petition for Review, due to a death in appellate counsel's family, this case was reassigned to the undersigned counsel.

range of penalties if found guilty. *S.Y.*. 162 Wis. 2d at 335.

*Pickens* did not require the circuit court to conduct an "on the record" colloquy regarding these four factors in every case. However, after *Pickens* and *S.Y.,* the supreme court "mandate[d] a colloquy in every case where a defendant seeks to proceed pro se." *State v. Klessig*, 211 Wis. 2d 194, ¶13, 564 N.W.2d 716 (1997). Conducting a colloquy "is the clearest and most efficient means" of determining that the defendant is not deprived of constitutional rights and documenting a valid waiver for purposes of appeal. *Id.*

*S.Y.* also held that it is within the circuit court's prerogative to determine whether the subject of a Chapter 51 proceeding is in fact capable of representing herself pro se. To make this decision, the circuit court applies the *Pickens* competency test. It considers the person's education, literacy, fluency in English, any physical or psychological disability that might prevent him from presenting a meaningful defense. *S.Y.,* 162 Wis. 2d at 336-337.

Turning to remedies, in a criminal case, when a circuit court fails to conduct the colloquy required for a waiver of counsel, the appellate court remands the case for an evidentiary hearing where the State must prove by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his right to a lawyer. *Klessig*, ¶15. There does not appear to be any Wisconsin case regarding the remedy when, in a Chapter 51 commitment proceeding, the circuit court fails to conduct a colloquy regarding the waiver of the right to counsel.

## II. In a Chapter 51 proceeding, the supreme court should also require a knowing, intelligent, and voluntary waiver of the person's statutory and due process rights before accepting a stipulation to a commitment.

A mental commitment "constitutes a significant deprivation of liberty that requires due process protections." *Addington v. Texas*, 441 U.S. 418, 425 (1979). The loss of liberty is more than a loss of freedom from confinement. A commitment engenders adverse social consequences for the person. It also involves intrusions on personal security, compelled treatment in the form of mandatory behavior modification, and violations of bodily integrity in the form of involuntary medication. *Vitek v. Jones*, 445 U.S. 480, 491-492 (1980).

When a person is committed in Wisconsin, she is placed in the custody of the county department of human services. Wis. Stat. §51.20(13)(a)3. County staff determine where the person will live and receive treatment. Staff may place the person in a locked inpatient unit in a state mental health institute, in a group home, or in outpatient treatment. The court's role is limited to determining the initial treatment facility and the maximum level of confinement during the commitment. Wis. Stat. §51.20(13)(c)1 and 2. *See J.R.R. v. State*, 145 Wis. 2d 431, 436-437, 427 N.W.2d 137 (1988).

Given the significant liberty deprivations, the subject of a commitment proceeding has a host of 14th Amendment due process rights, including: (1) the right

to written notice of the proceeding; (2) the right to a hearing, sufficiently after the notice, to permit the individual to prepare, where she is informed of the evidence relied upon for the commitment and she has the opportunity to be heard in person and to present documentary evidence; (3) the right to present the testimony of witnesses and to confront and cross-examine the county's witnesses; (4) the right to an independent decisionmaker; (5) the right to a written statement by the factfinder as to the evidence relied upon and the reasons for the commitment; and (6); the right to effective and timely notice of all of these rights. *Vitek*, 445 U.S. at 494-495. In addition, the subject has a number of statutory rights, including the right to counsel. Wis. Stats. §51.20(5)(a).

The United States Supreme Court has recognized that in some situations a mentally ill person might be incapable of exercising informed consent regarding treatment, yet nevertheless sign papers authorizing a voluntary admission to a psychiatric hospital. To prevent this from occurring, it held that the 14th Amendment requires procedural safeguards to ensure that mentally ill people are not committed when they don't meet the statutory and constitutional requirements for a commitment. *Zinermon v. Burch*, 494 U.S. 113, 133-134 (1990) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

The supreme court has not yet established a procedure whereby a person may stipulate to a commitment. In *S.Y.* the supreme court required a knowing, intelligent and voluntary waiver of a person's statutory right to counsel in a commitment

proceeding. The supreme court should also require a knowing, intelligent and voluntary waiver of a person's 14th Amendment and statutory rights before allowing a stipulation to a commitment. In *S.Y.,* the supreme court looked to criminal law and adopted the *Pickens* test for establishing a valid waiver of counsel in a commitment case. It should likewise look to criminal law for developing the test for stipulating to a commitment. *See e.g. State v. Bangert*, 131 Wis. 2d 246, 261-262, 389 N.W.2d 12 (1986); Wis. Stat. §971.08(1)(a).

A *Bangert*-style test modified for Chapter 51 could, for example, require a personal colloquy between the circuit court and the person to determine:

- The person's education, comprehension, and capacity to enter a stipulation;
- Whether any threats or promises were made to induce the person to stipulate to the commitment;
- Whether the person understands the legal standard and factual basis warranting her commitment and that the county must prove its case by clear and convincing evidence;
- Whether the person understands the consequences of a commitment, including where she will be placed initially, the maximum level of confinement, and the length of the commitment;
- Whether the person understands that she has a right to counsel and counsel could uncover

defenses or mitigating circumstances that are not apparent to a layperson;

- Whether the person understands what each of her statutory and constitutional rights are and that she is waiving them;

- Whether the person understands that by stipulating to a commitment she will automatically lose her 2nd Amendment right to bear arms.

*Zinermon* held that the 14th Amendment requires procedural safeguards to ensure that mentally ill people who are incompetent to exercise informed consent don't commit themselves without a determination that they satisfy the constitutional requirements for commitment. *S.Y.* held that a person undergoing commitment must make a knowing, intelligent, and voluntary waiver of the right to counsel. Requiring a circuit court to conduct a *Bangert*-style colloquy before accepting a stipulation to a commitment aligns with these decisions.

As for remedies, when a circuit court fails to conduct a colloquy or conducts a defective colloquy in a commitment proceeding, the remedy will depend upon whether the circuit court has lost competency to hear the case. *See e.g. Sheboygan County v. M.W.,* 2022 WI 40, 402 Wis. 2d 1, 974 N.W.2d 733.

## III. The supreme court should grant review to address whether a circuit court may ever accept a person's stipulation to an involuntary medication order. If so, then the supreme court should require a knowing, intelligent and voluntary waiver of the person's statutory and due process rights first.

### A. The supreme court should grant review to determine whether as a matter of law a person can ever stipulate to involuntary medication.

In order to commit a person, a court must have clear and convincing evidence that the person is mentally ill, a proper subject for treatment, and dangerous. Wis. Stat. §51.20(1)(a). But even after the circuit court makes these three findings, the person retains the right to exercise informed consent about the medications, treatments and procedures administered to her body unless a court finds the person incompetent to make these decisions. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 735-736; 416 N.W.2d 883 (1987); Wis. Stat. §51.61(1)(g)4.

If a person is found ***incompetent*** to make medication or treatment decisions, then by definition she is incompetent to stipulate to medication or treatment. If a person is ***competent*** to make medication or treatment decisions, then she decides whether to accept them or not. The government cannot override her decision unless she poses an immediate risk of serious physical harm to herself or others.

*Jones*, 141 Wis. 2d at 728, 739; Wis. Stat. §51.61(1)(g)1.

Lauren's appellate lawyer preserved the issue of whether her stipulation to an involuntary medication order was knowing, intelligent, and voluntary. (COA Initial Br. 1). Lauren's current lawyer would argue that under the 14th Amendment a person cannot ever "stipulate" to "involuntary" medication. If the supreme court grants review, it should exercise its superintending authority to resolve the question. The supreme court's superintending authority is as broad and as flexible as necessary to insure the administration of justice in a case. *State ex rel. Universal Processing Services of Wisconsin*, 2017 WI 26, ¶¶47-48, 374 Wis. 2d 26, 892 N.W.2d 267.

It is appropriate for the supreme court to exercise superintending authority over this matter because whether a person may stipulate to involuntary medication is a significant constitutional question. It will likely recur whenever a circuit court addresses a stipulation to a commitment. And until the supreme court resolves the issue, people will suffer the involuntary administration of antipsychotic medications—a harm that cannot be undone by a successful appeal. *Id.* (listing grounds for exercising superintending authority); *State v. Scott*, 2018 WI 74, ¶44, 382 Wis. 2d 476, 914 N.W.2d 141 (noting irreparable harm).

B. Alternatively, the supreme court should require a knowing, intelligent, and voluntary waiver before accepting a stipulation to involuntary medication.

If the supreme court concludes that a person may stipulate to ***involuntary*** medication or treatment, then Lauren contends that the supreme court should again require the circuit court to conduct a *Bangert*-style colloquy to ensure that the person's stipulation is knowing, intelligent, and voluntary.

## IV. The court of appeals' decision is wrong.

The court of appeals made numerous mistakes. First, and foremost, it held that Lauren "failed to rebut the statutory presumption that she was competent to consider the options available to her, to review and analyze how the trial had gone that morning, and whether she could stipulate to the two orders (for commitment and involuntary medication." (Opinion, ¶22; App.13). "Accordingly, this court upholds the trial court's determination that the stipulation was knowingly, intelligently and voluntarily made by [Lauren]" (Opinion, ¶23; App.14).

It is one thing to say, as the legislature has, that ***"[n]o person is deemed incompetent*** to manage his or her affairs, to contract, to hold professional, occupations, or motor vehicle operator's licenses, to marry or to obtain a divorce, to vote, to make a will or exercise any other civil right ***solely by reason of his or her admission to a facility in accordance with this chapter or detention or commitment under this chapter***." Wis. Stat. §51.59(1).

It is another thing to say that a mentally ill person who is ***found incompetent*** to make medication and treatment decisions must nevertheless be presumed competent to stipulate to a commitment (which necessarily entails treatment) and to involuntary medication. That's an absurd reading of §51.59(1), and it defies *Zinermon*.

Furthermore, a knowing, intelligent and voluntary stipulation requires more than just the mental capacity to enter one. It requires proof that the person was apprised of and understood all of her statutory and constitutional rights and the consequences of waiving them. In Lauren's case there was no "waiver of rights" form as there was in N.W. The circuit court did not list any of the rights that Lauren was waiving. It did not tell her that it would initially place her at Winnebago, a state psychiatric hospital. It did not tell her that if she stipulated to a commitment she would lose her gun rights. It did not ask Lauren's lawyer what he discussed with her. Lauren's lawyer did not say what he discussed with her, and he did not confirm that her decision was knowing, intelligent, and voluntary.

Wisconsin law provides that before the circuit court may find a person incompetent to make medication decisions, she must be told, and the circuit court must find that she was told, the advantages, disadvantages and alternatives of the "***particular*** medication" to be administered to her. Wis. Stat. §51.61(1)(g)4. (Emphasis supplied); *see also Virgil D. v. Rock County*, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994)(holding that before deciding competency the circuit court must first be satisfied that the person

received an "adequate" medication explanation). Lauren repeatedly asked the circuit court tell her the medication she would be required to take, but the circuit court refused to provide that information.

Second, the court of appeals held that colloquies are not required for a stipulation to a commitment and involuntary medication. (Opinion, ¶14; App.9). It noted that for pleas in criminal cases and TPR cases the governing statutes require colloquies, but Chapter 51 contains no similar provision. The absence of a statutory requirement is not dispositive. In these circumstances, the 14th Amendment requires a fair procedure. Before a person may be committed, there must be a determination that she is capable of giving informed consent, or the involuntary commitment process must be followed. *Zinermon*, 494 U.S. at 131.

Finally, the court of appeals held that forcing a person to appear in court for a colloquy could be too traumatic, stressful or harmful for a person undergoing a commitment. (Opinion, ¶¶17-18; App.10-11). The court of appeals pulled this rationale out of thin air. There is no information in the record to support it. Assuming the court of appeals' concern is legitimate, the supreme court could allow circuit courts to conduct the colloquy by Zoom or by telephone.

## CONCLUSION

For the reasons stated above, L.A.T. respectfully requests that the supreme court grant this petition for review.

Dated this 23rd day of February, 2023.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,247 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 23rd day of February, 2023.

Signed:

COLLEEN D. BALL
Assistant State Public Defender