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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2022AP606-FT

In the matter of the condition of P.D.G.:
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

P.D.G.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Whether the circuit court erroneously denied defense counsel's motion to adjourn Paul's[1] recommitment and involuntary medication hearing when it (a) construed §51.20(10)(e) as permitting only one adjournment, (b) assumed facts not in evidence, and (c) failed to consider all of the factors in *State v. Wollman*, 86 Wis. 2d 459, 273 N.W.2d 225 (1979), including, but not limited to, the inconvenience and prejudice to Paul.

   The court of appeals answered "no."

2. Whether, under §51.61(1)(g)4 and §51.20(1)(a)2.e, a circuit court may find that a county showed clear and convincing evidence that an examiner gave an individual a reasonable explanation of "the advantages, disadvantages and alternatives to accepting the ***particular*** medication or treatment" when the county fails to elicit the examiner's explanation, including the ***particular*** medication prescribed and ***its*** advantages, disadvantages and alternatives.

   The court of appeals answered "yes."

[1]Pursuant to §809.19(1)(g) this brief refers to the appellant by the pseudonym "Paul."

CRITERIA FOR REVIEW

The first issue for review satisfies §809.62(1r)(c)2 and 3. There do not appear to be any published Wisconsin cases construing the plain language of §51.20(10)(e), and this case is the first to apply the *Wollman* factors to a motion for adjournment of a final commitment hearing. These are novel questions of law. The resolution of them will affect Chapter 51 proceedings throughout the state. And these questions are likely to recur unless the supreme court resolves them.

The second issue for review satisfies §809.62(1r)(c)3 and (e). The supreme court requires an examiner to give an individual "a ***reasonable*** explanation of proposed medication." *Outagamie County v. Melanie L.*, 2013 WI 67, ¶67, 349 Wis. 2d 148, 833 N.W.2d 607. (Emphasis supplied). "The explanation should include why a ***particular*** drug is being prescribed, what the advantages of ***the drug*** are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to ***the prescribed medication***. *Id.* (Emphasis supplied).

The supreme court also holds that when deciding an individual's competency to make medication decisions, "the ***circuit court must first*** be satisfied that the advantages and disadvantages of, and the alternatives to, medication have been ***adequately explained*** to the patient." *See Virgil D. v. Rock County*, 189 Wis. 2d 1, 14-15, 524 N.W.2d 894 (1994). (Emphasis supplied).

The question of whether a county may carry its burden of proving to the circuit court that an examiner gave an individual a ***reasonable*** explanation of a particular medication without eliciting the explanation actually given—including the ***particular*** medication and ***its*** advantages, disadvantages and alternatives—is recurring, and the court of appeals districts have split over it. District 4 has issued a decision that agrees with District 2's decision in this case. However, Districts 2, 3, and 4 have issued decisions that conflict with District 2's decision in this case. The supreme court should grant review in order to resolve the conflict.

STATEMENT OF FACTS

On December 21, 2021, Winnebago County filed a Petition for Recommitment and for Involuntary Medication or Treatment for Paul. (R.2). The petition alleged that (1) Paul's initial commitment would expire on February 5, 2022; (2) if treatment were withdrawn Paul would become a proper subject for commitment under either the 2nd or 5th standards of dangerousness in §51.20(1)(a)2; and (3) Paul was incompetent to make medication or treatment decisions. (*Id*.).

On Friday, January 14th, the State Public Defender prepared an order appointing counsel for Paul. (R.7).

January 17th was a state holiday.

On January 18th, the SPD filed its order appointing counsel and gave defense counsel Paul's file. (R.7).

On January 19th, defense counsel requested an adjournment. He explained that he was given Paul's file on January 18th. Due to the pandemic, the Wisconsin Resource Center would not allow him to speak to Paul until the 19th. Counsel had insufficient time to discuss Paul's rights with him. He asked the court to adjourn the hearing to a later date. (R.8).

On January 20th, the court adjourned the case to January 21st at 3:15 p.m. (R.20:2; App.54).

That same day, counsel demanded discovery of DHS and DOC records. He sought records that the County relied upon for its petition, records it intended to introduce at trial, and records relating to the medication explanation provided to Paul. Counsel stated that this information was "material and necessary to the preparation of his defense on the merits." (R.13).

On January 21st at 3:15 p.m., the court called the case, and counsel requested another adjournment:

> There are 550 pages of discovery in this case that I've been working through since receiving them at 1:00 p.m., obviously I haven't had time to do so, so I would just request the adjournment in order to feel that I would be an effective representative. (R.21:2; App.23).

The court denied the adjournment. It noted that it had adjourned the hearing once based on the "letter filed on the 9th [sic] of January." (*Id.*) The SPD

appointed counsel on Friday, January 14th. Monday, January 17th was a state holiday, but the County had filed the petition back in December. (*Id*.).

The court said: "I don't know what the delay was in getting the public defender appointment here." (R.21:2-3; App.23-24). It noted that defense counsel was a staff attorney, so the SPD wasn't pursuing a private bar appointment. "[I]t does appear there was some delay in regards to that appointment process." (R.21:3; App.24).

The court said it had "a calendar that does not have time to adjourn it beyond today within that timeframe that the statute provides for in adjournments—up to seven days—so it was adjourned to today." (*Id*.).

The court held that "there's an opportunity to adjourn ***one time*** under the statutes," and that was already granted. (*Id*.) (Emphasis supplied). It noted that "appellate courts have also discussed the court's ability to manage their calendar in these types of proceedings." (*Id*.).

Counsel stressed the difficulty communicating with Paul due to WRC's 48-hour notice requirement. (R.21:4; App.25). The court acknowledged the problem but stressed that: (1) "there's some delay on the part of the public defender in this case getting counsel appointed"; and (2) "***I don't think the statute permits me to grant another postponement in this case and my calendar doesn't permit it to be adjourned***." (R.21:4-5; App.25-26). (Emphasis supplied).

The County then called Dr. Monese, a WRC psychiatrist. He had treated Paul since 2019 and diagnosed him with schizophrenia. Monese opined that if treatment were withdrawn Paul would become a proper subject of commitment. (R.21:7-8; App.28-29).

According to Monese, Paul threatened to kill his girlfriend and Monese in November or December 2021. (R.21:10-11; App.31-32). Paul did not make these threats directly to Monese. Paul allegedly wrote that he wanted Monese to be part of the earth and nourish the soil and gave the paper to staff, who showed it to Monese. (R.21:22-23; App.43-44).[2]

Monese testified that Paul was incompetent to make medication or treatment decisions "because of his mental illness." (R.21:12, 18; App.33 and 29). Paul claims to be black Egyptian and will not accept Western medication for schizophrenia or psychosocial interventions. (R.21:16; App.37). According to Monese, Paul "doesn't believe that he needs treatment." (R.21:17; App.38).

Monese said that he attempted to discuss the advantages, disadvantages and alternatives to medication with Paul. (R.21:18; App.39). The County asked him to "cite ***one*** of the advantages" that they discussed. (R.21:19; App.40). (Emphasis supplied). Monese replied: "***the medications*** will improve his thought process, his thinking, and hopefully so that he can live a normal life in Wisconsin Resource Center or anywhere he goes within the prison system." (R.21:19;

[2] The County did not offer Paul's alleged written threat or Monese's reports into evidence.

App.40). (Emphasis supplied). Monese did not specify the "medications."

The County asked Monese "what are some ***or one*** of the disadvantages" that he discussed with Paul. (*Id.*) (Emphasis supplied). Monese replied: "Disadvantage is, major one, sometimes sedation but it happens in starting treatment." (*Id.*).

Regarding alternatives, Monese said: "I tried to talk to him about alternatives for treatment that I was supposed to be engaging in and he's not." (*Id.*)

Lastly, the County asked whether Paul was "capable of expressing an understanding of those advantages, disadvantages and alternatives" and Monese replied: "No he was not able to demonstrate that aspect to me." (*Id.*).

Paul testified next. He said that his religion is black Egyptian. It does not allow him to accept Western medicine. Instead, he takes herbs, and he insisted on that the last time he went to the hospital. (R.21:24; App.45).

The circuit court found that Paul is mentally ill and a proper subject for treatment. (R.21:27; App.48). It also found him dangerous under the 2nd and 5th standards:

> The Doctor did testify that there has been some threats made by [Paul] to the Doctor, those took place in the later part of 2021 so that would be characterized as recent acts, and the Doctor did testify that they were in the form of a letter—note written by [Paul] to the Doctor and did allude to what reasonably can be construed as death

> threats here based on what the Doctor did indicate on the record today and Doctor did indicate that he is fearful of his safety as a result of those threats.
>
> I also feel that the standards under a 51.20(1)(A2E) [sic] are also met in this case so that the dangerousness prong is met under both those particular subsections of Chapter 51.20, again, to a clear and convincing evidence standard. (R.21:28; App.49).

The court also approved the County's request for an involuntary medication order:

> [T]he Doctor did advise [Paul] as to the advantages, disadvantages, and alternatives of the psychotropic medication and did provide some examples as to the advantages and disadvantages of that medication, that the medication would have therapeutic value to it, and would not unreasonably impair [Paul's] ability to participate in future legal proceedings.
>
> The Doctor does feel that Paul is not competent with regards to refusing or accepting the medication and that he's substantially incapable of applying the advantages, disadvantages and alternatives to his condition in order to make an informed choice as to whether to accept or refuse the psychotropic medications. (R.28-29; App.49-50).

As a result, the circuit court entered 12-month orders for recommitment and involuntary medication. (R.14, 15; App. 19, 21).

Paul appealed.[3] He first argued that the circuit court erroneously denied his request for an adjournment because it misinterpreted the plain language of §51.20(10)(e), which limits only the length of an adjournment, not the number of adjournments. He noted that the County did not oppose an adjournment so the court could have held a hearing beyond the 7-day period pursuant to stipulation given that his initial commitment would not expire for another two weeks. He also argued that the circuit court failed to apply the law—*Wollman*—to the "facts of record" and to explain its reasoning on the record.

Next, Paul argued that the County presented insufficient evidence to prove that he is incompetent to make medication or treatment decisions. Specifically, the County failed to elicit clear and convincing evidence that Monese gave Paul a ***reasonable*** explanation of the "***particular*** medication" that he wanted to administer to Paul, contrary to §51.61(1)(g)4, §51.20(1)(a)2.e, *Melanie L.*, and *Virgil D.* The County further failed to elicit evidence of the 5 factors, required by *Virgil D.,* to prove that Paul was incapable of expressing an understanding of Monese's explanation. *See Virgil D.* 189 Wis. 2d 1, 14-15; *Melanie L.,* ¶50. And because the County did not attempt to elicit the 5 *Virgil D.* factors, it also failed to establish that Paul was incapable of applying his understanding of the unspecified medication to his own condition. *Melanie L.*, ¶71.

[3]His appeal proceeded on the Fastrack, so the length of an initial brief was limited to 3,300 words.

The court of appeals affirmed the circuit court on both issues. Its reasoning is set forth in the Argument section below.

ARGUMENT

I. The supreme court should clarify the law governing the adjournment of Chapter 51 hearings.

A. The supreme court should establish a definitive interpretation of §51.20(10)(e).

Section 51.20(10)(e) provides:

> At the request of the subject individual or his or her counsel the final hearing under par. (c) may be postponed, but in no case may the postponement exceed ***7 calendar days*** from the date established by the court under this subsection for the final hearing. (Emphasis supplied).

The court of appeals held that Paul did not develop his arguments that the plain language of the statute limits the length, not the number, of adjournments and does not preclude stipulations. Thus, it declined to "definitively rule" on them. (Decision, ¶22 n.3; App.14). However, in a footnote it said:

> We do note, however, that it is understandable that the circuit court may have concluded the statute only affords one adjournment as it refers to "the postponement" as opposed to, for example, "any postponements. . . .

> [T]his statute . . . plainly states that in no case may the postponement exceed 7 calendar days from the date established by the court under this subsection from the final hearing. . . . the legislature's inclusion of "in no case" would appear on its face to preclude adjournment beyond seven days even in the case of stipulation. *Id.*

The legislature created §51.20(10)(e) through 1987 Wis. Act 366 §118. There are no accompanying notes indicating the legislature's intent. Only two published appellate decisions mention the statute, and they do not address the issues presented by this case. *See Waukesha County v. E.J.W.*, 2021 WI 85, ¶34, 399 Wis. 2d 471, 966 N.W.2d 590 (noting that §51.20(10)(e) governs adjournments, and the circuit court has the discretion to deny them); *G.O.T. v. Rock* County, 151 Wis. 2d 629, 635 445 N.W.2d 697 (Ct. App. 1989)(noting that §51.20(10)(e) governs adjournments).

One interpretation of §51.20(10)(e)'s plain language is that if the individual or defense counsel requests an adjournment of the date established for a final hearing, the court may postpone it one or more times for a period not to exceed 7 calendar days from the date established for the final hearing.

A second interpretation of §51.20(10)(e) is that it allows a court to postpone a final hearing one single time for up to 7 days. For example, if defense counsel requests a one-day postponement because Covid restrictions have prevented him from meeting his client, the court could grant one. But if defense counsel happened to be in a car accident on the way to the postponed hearing, that would be too bad for the client.

The court would have to hold the hearing anyway because there can be only one adjournment.

Another interpretation of §51.20(10)(e) is that it governs an individual's "request" for a postponement—a request that the circuit court must rule on by applying the law to the facts. But it does ***not*** govern stipulations where the individual and the county agree to hold the final hearing at a later date that fits the court's schedule. A recent court of appeals decision suggests this interpretation. The subject individual's commitment expired on May 8, 2020 "but both parties stipulated to delaying her jury trial until August 18, 2020, as a result of the COVID-19 pandemic." *Outagamie County v. C.J.A.*, 2022 WI App 36, ¶4, n. 5, __Wis. 2d__, 978 N.W.2d 493.

Section 51.20(10)(e) was not at issue in *C.J.A.*, but that's the point. It did not prevent the parties from stipulating to a trial well outside the statute's 7-day period. In Paul's case, the County did not oppose his second request for an adjournment. Two weeks remained on Paul's expiring commitment, so even if the court was unavailable for the next 6 days, §51.20(10)(e) did not preclude the parties from stipulating to a final hearing in 8, 10 or 14 days.

Motions to adjourn final hearings under Chapter 51 are not unusual. The supreme court should grant review to provide a definitive construction of §51.20(10)(e) for lower courts and the bar.

B. The supreme court should establish what factors a circuit court must consider when deciding a motion to adjourn a final hearing.

Paul argued that the circuit court failed to apply *Wollman* to the facts of record when deciding his motion to adjourn. The County argued that the circuit court applied *Wollman* correctly.

Wollman held that a motion for adjournment affects a person's right to counsel and right to due process. *Wollman*, 86 Wis. 2d at 468. When deciding a motion for adjournment the circuit court must weigh these rights against the public interest and the prompt, efficient administration of justice. *Id*.

Wollman also held that the denial of an adjournment may be fundamentally unfair even without proof of specific prejudice. ***"[I]f counsel is given virtually no time to prepare a defense***, ***the defendant is not required to point to something specifically that counsel could have done for him*** but for the short time allotted for preparation." *Id*. at 470. (Emphasis supplied).

When deciding a motion for adjournment, the circuit court should consider these factors:

> 1. The length of the delay requested.
>
> 2. Whether the "lead" counsel has associates to try the case in his absence;
>
> 3. Whether other continuances had been requested and received by the defendant;

> 4. The convenience or inconvenience to the parties, witnesses, and the court;
>
> 5. Whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; and
>
> 6. Other relevant factors. *Id.* at 470.

Applying *Wollman*, the court of appeals held that counsel failed to indicate the length of adjournment he wanted. (Decision, ¶¶17-18; App.11-12). Paul had already received one adjournment, and it was defense counsel's own fault that he received 550 pages of discovery just 2 hours and 15 minutes before the hearing. He should have filed his discovery demand sooner. The circuit court, counsel, and Monese would have been inconvenienced by an adjournment. (*Id.*, ¶¶19-20, App.12). And the sixth *Wollman* factor was the "real kicker" in this case.

> As indicated, the court was faced with a statutory seven-day-calendar-day time limitation for holding the hearing after January 20. By January 21, this was down to six calendar days. This was not the common scenario in which the hearing could be adjourned two months with no other litigants in other cases necessarily displaced and inconvenienced—the scenario created a significant bind for the court, one which does not arise in almost any other criminal or civil context. (Decision, ¶22; App.13).

Wollman is a criminal case. There are no published opinions explaining that circuit courts should apply the *Wollman* factors when deciding motions for adjournment under §51.20(10)(e). Indeed, there is only one published appellate decision discussing how circuit courts are to decide motions for

adjournments under §51.20(10)(e)—*E.J.W.* It does not adopt *Wollman* or list all of the *Wollman* factors noted above. Rather, *E.J.W.* holds:

> When faced with a motion for adjournment, the circuit court may evaluate the circumstances under which an adjournment is sought and make its own determination as to whether a person subject to a commitment is attempting to manipulate the system and, if so, it may deny the motion. If witnesses are scheduled to come in on a certain day and a jury demand has not been filed, the circuit court has the discretion to deny the adjournment and proceed in the name of convenience to the County and its witnesses. In other words, if the County is prejudiced by an adjournment, it is free to argue that on a case by case basis. *E.J.W.*, ¶¶34-35.

The dissent to *E.J.W.* raises many concerns about abuse of motions to adjourn, upended schedules, waste of judicial resources, unnecessarily long pre-hearing detentions, circuit courts erring on the side of granting adjournments in order to avoid being reversed on appeal, and circuit courts erring on the side of denying adjournments and motions to withdraw as counsel. *Id.* ¶¶60-61. Instructing circuit courts and lawyers to consider the *Wollman* factors when deciding a motion under §51.20(10)(e), and explaining how to weigh those factors, would minimize the problems identified by the dissent.

Thus, the supreme court should also grant review in order to establish what factors circuit courts are to weigh when deciding motions for adjournment under §51.20(10)(e).

C. The circuit court erred.

"Whether to grant or deny an adjournment is a decision left to the circuit court's exercise of discretion." *E.J.W.*, ¶34. A circuit court must explain on the record its reasons for its discretionary decisions to ensure the soundness of its decision-making and facilitate appellate review. It must demonstrate that it examined the relevant facts, applied a proper standard of law, and used a rational process to arrive at a conclusion that a reasonable judge would make. *State v. Scott*, 2018 WI 74, ¶¶38-39, 382 Wis. 2d 476, 914 N.W.2d 141 (quoted source omitted).

The circuit court's first mistake was failing to apply the proper standard of law. The plain language of §51.20(10)(e) does not limit the individual to one adjournment.

Next, the circuit court failed to apply the law to the ***facts of record***. There were no facts of record—zero—to suggest that the SPD had delayed in appointing counsel. For all anyone knew the SPD searched high and low for a private bar attorney and, having failed to find one, drafted a staff attorney at the last minute. The circuit court simply assumed misconduct on the SPD's part.

Turning to the *Wollman* factors, defense counsel orally raised the need for an adjournment at the January 21st hearing. The circuit court shut down the motion to adjourn without bothering to ask how long counsel needed to review the 550 pages of discovery—hours, days, or weeks.

The circuit court did consider its own calendar for the next 6 days and said it did not have time within that period to reschedule the hearing. It did not explain why on the record or consider alternatives such as whether another court could hear Paul's case or whether the parties could stipulate to hearing beyond the 7-day period.

The circuit court failed to consider the fact that the County did ***not*** object to Paul's request for a second adjournment. Nor did the County assert that Monese couldn't testify at another date and time.

The circuit court failed to consider that ***Paul*** had absolutely no control over the SPD's appointment of counsel, the day that his attorney received his file, and WRC's rules for scheduling attorney-client calls during the pandemic.

The circuit court did not consider the extraordinary inconvenience to Paul if the adjournment were denied. Counsel had requested the treatment records that the County relied upon in its petition, records that it intended to introduce at trial, and records of the medication explanation given to Paul. (R.13). Counsel said that he could not represent Paul effectively without an adjournment to review those records. The most damaging evidence against Paul was Monese's testimony about his treatment history, alleged conduct, and alleged written threats during treatment. (R.21:12-14; App.33-35). Counsel was denied an opportunity to review the records to determine whether they supported or refuted Monese's assertions.

In sum, the circuit court failed to demonstrate that it applied the proper standard of law to the facts of record and used a rational process to arrive at a conclusion that a reasonable judge could reach.

II. The supreme court should grant review to resolve a conflict among the districts regarding the "reasonable explanation of a particular medication" requirement.

A. The law governing how circuit courts are to decide competency to make medication or treatment decisions.

Numerous Wisconsin statutes require the government to prove that a person is incompetent to make medication or treatment decisions before medicating him against his will. *See e.g.* Wis. Stat. §51.61(1)(g)2, 3 and 4; §51.20(1)(a)2.e; §971.14(3)(dm); and §971.16(3). All of these statutes impose the same standard. Paul's case concerns §51.61(1)(g)3 and 4 and §51.20(1)(a)2.e.

Section 51.61(1)(g)3 provides that a person has "the right to exercise informed consent with regard to all medication and treatment" unless the County satisfies the standard in §51.61(1)(g)4 or §51.20(1)(a)2.e.[4]

Section 51.61(1)(g)4 provides that:

[4] Section 51.20(1)(a)2.e incorporates §51.61(1)(g)4's competency standard. *See* §51.61(1)(g)3m. Thus, if the County's evidence is insufficient, both the involuntary medication order and the 5th standard commitment fail.

> [A]n individual is not competent to refuse medication or treatment if, because of mental illness, . . . and after the advantages and disadvantages 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 . . . in order to make an informed choice as to whether to accept or refuse medication or treatment. (Emphasis supplied).

This standard protects the person's 14th Amendment right to avoid government administered antipsychotic medication. *Melanie L.,* ¶43.

A court must begin by presuming that the person is competent to make medication decisions. *Id.*¶45. A county must offer clear and convincing evidence to overcome this presumption. *Id.,* ¶83.

A court cannot find a person incompetent to make medication decisions based on mental illness alone. "An individual may be psychotic, yet nevertheless capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision." *Id.*

To carry its burden of proof, the County must first prove that a doctor gave the person a "reasonable

explanation" of the "particular drug." According to *Melanie L.,* a "reasonable explanation"

> should include why ***a particular drug*** is being prescribed, what the advantages of ***the drug*** are expected to be, what side effects might be anticipated or are possible, and whether there are any reasonable alternatives to ***the prescribed medication***. The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element ***in court.***

Id., ¶67. (Emphasis supplied). *See also* §51.61(1)(g)4 (requiring an explanation of the "particular medication").

Second, if the County proves that a doctor gave the person a "reasonable explanation," it may try to establish that the person is "incapable of ***expressing*** an understanding" of the doctor's explanation per §51.61(1)(g)4.a. To decide this point, the circuit court must weigh: (1) whether the person is able to identify the type of recommended medication; (2) whether he previously received that type of medication; (3) if so, whether he can describe how its effects were harmful or helpful; (4) if not, then whether he can identify the risks and benefits associated with it; and (5) whether he holds patently false beliefs about the medication that would prevent an understanding of its risks and benefits. *Virgil D.*, 189 Wis. 2d at 14-15; *Melanie L.,* ¶50.

Third, the County may instead try to prove that the person is incapable of "***applying*** his understanding" of the medication to his own condition pursuant to §51.61(1)(g)4.b. "Put another way, 'applying an understanding' requires a person to ***make a connection between an expressed understanding*** of the benefits and risks of medication and the person's own mental illness." *Id.*, ¶71. (Bolded emphasis in original; underlined emphasis supplied).

To summarize, whether the County proceeds under §51.61(1)(g)4.a or b, it must establish (1) that a doctor gave the person a "***reasonable*** explanation" of the advantages, disadvantages, and alternatives of a particular medication and (2) the person's ***understandin***g of the medication and the explanation.

B. The court of appeals districts are split over the evidence a county must offer to prove that an examiner provided a "reasonable explanation" of the advantages, disadvantages and alternatives to a "particular medication or treatment."

Paul urged the court of appeals to reverse his involuntary medication order and his commitment under the 5th standard because the County failed to offer clear and convincing evidence to satisfy the statutory competency test. Specifically, the County never established the "particular drug" that Monese prescribed for Paul. It's nowhere in the transcript.

Nor did the County elicit Monese's explanation of the unidentified medication's advantages,

disadvantages, and alternatives. The County only asked Monese to name one advantage and one disadvantage that he explained to Paul. The unidentified "medications" could improve his thought process but be sedating. (R.21:18-19; App.39-40). Monese said he tried to discuss alternatives with Paul, but the County failed to elicit which ones. (R.21:19; App.40).

Monese testified that Paul was incapable of "expressing an understanding" of the advantages, disadvantages, and alternatives to medication. (*Id*.) However, the County failed to elicit testimony on the 5 factors in *Virgil D.*—the factors a court must weigh when determining a person's "expressed understanding." The County did not ask either witness whether Paul could identify the prescribed medication or knew whether he had ever taken it before. If Paul had taken it before, could he say whether it was helpful or harmful? If he had never taken it, could he identify its risks and benefits? Did he hold any patently false beliefs about the unidentified medication? The record doesn't say.

The court of appeals did not acknowledge the controlling language from *Melanie L.* or *Virgil D.* Rather, it faulted Paul for not citing any authority requiring the testifying examiner to identify the "particular medication" that he explained to the individual. It held that "***a reasonable inference*** from Monese's testimony is that there was ***some 'particular medication'*** that was used for treating [Paul] and that Monese discussed advantages and disadvantages of it with [Paul] and also tried to

discuss alternatives with him. (Decision, ¶8; App.8-9). (Emphasis supplied).

The court of appeals held that Monese's conclusory statement that Paul was unable to "convey an understanding" of the advantages, disadvantages, and alternatives to an unidentified medication was sufficient. (Decision, ¶28; App.16).

The court of appeals also faulted Paul for failing to cite a case holding that an examiner must testify to more than one advantage or disadvantage to a proposed medication. (Decision, ¶29; App.16). It held that examiners cannot be expected to break down the advantages of medication for the court beyond saying that it will improve the person's thought process. And examiners may testify to the only disadvantage that the examiner deems to be of consequence—in this case sedation. (*Id.*) [5]

It further suggested that the examiner's explanation does not matter when an individual like Paul does not believe he needs treatment and rejects Western medicine. (Decision, ¶30; App.17).

In 2014, District 3 reached the opposite conclusion and reversed an involuntary medication order. *Eau Claire County v. Mary S.*, 2014 WI App 24, 352 Wis. 2d 756, 843 N.W.2d 712

[5]Consider the implications of this approach. The unidentified, "particular medication" could be Haldol, which causes sedation. But a "reasonable" explanation of Haldol's disadvantages would surely include a discussion of its up to 35% chance of serious health consequences for the patient. *See State v. Green*, 2021 WI App 18, ¶23, 396 Wis. 2d 658, 957 N.W.2d 583.

(unpublished)(App.70). The county argued that it may carry its burden of proof without eliciting the words the examiner used to explain the medication to the individual—especially when the person is non-directable in communication.

Mary S. rejected the county's argument. It noted *Virgil D.'s* holding: "In making its [competency] decision, the ***circuit court*** must ***first*** be satisfied that the advantages, disadvantages of, and alternatives to medication have been ***adequately*** explained to the patient." *Mary S.*, ¶10 (quoting *Virgil D.,* 189 Wis. 2d at 14). (Emphasis on "first" added by *Mary S.,* additional emphasis supplied). The examiner's testimony that he gave the required explanation was insufficient to prove that the explanation he gave "was reasonable." *Id.* ¶15. Among other things, the examiner failed to testify what he told the individual about why a "particular drug" was being prescribed and what its advantages and side effects are expected to be. *Id.* ¶¶15-16.

In 2014, District 2 reversed an involuntary medication order based on reasoning that conflicts with District 2's reasoning in Paul's case. *Waukesha County v. Kathleen H.*, 2014 WI App 83, 355 Wis. 2d 580, 851 N.W.2d 473(Unpublished)(App.66). *Kathleen H.* held that: "Before the circuit court can consider whether an individual can apply an understanding of the advantages and disadvantages of and alternatives to the particular medication or treatment, it must ensure that she has received 'the requisite explanation' in order to make an informed choice. *Id.*, ¶7.

Kathleen H. found the county's evidence insufficient because the examiner did not provide any detail about the "particular medication" that he prescribed for the individual, including the possible benefits and what specific side effects were possible. *Id.*, ¶8. Furthermore, the fact that the individual rambled on about why she did not want medication told the court "nothing about the explanation she received." *Id.*

In 2016, District 4 issued a decision similar to District 2's decision in Paul's case. *Marquette County v. T.F.W.*, 2016 WI App 34, 369 Wis. 2d 74, 879 N.W.2d 810 (unpublished)(App.75). *T.F.W.* rejected the individual's argument that the county had to elicit what the individual was told about "why a particular medication" was being prescribed and what's its advantages, disadvantages and alternatives were expected to be. *Id.*, ¶11. *T.F.W.* rejected "the view that *Melanie L.* requires detailed testimony about what the patient was told." *Id.*, ¶12.

T.F.W. declined to follow *Mary S.* and *Kathleen H.* because they predated *Winnebago County v. Christopher S.*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109. *T.F.W.*, ¶16. And *Christopher S.* allegedly approved testimony that was like the testimony at issue in *T.F.W. Id.* ¶16. *But see Christopher S.,* ¶56 (noting the examiner's testimony about the particular medication prescribed—lithium).

Well after *Christopher S.* and *T.F.W.,* District I reached the same conclusion as *Mary S.* and *Kathleen H.* and the opposite conclusion as *T.F.W. See State v.*

Jarrod J. Johnson, No. 2021AP2046-CR (Wis. Ct. App. May 24, 2022)(unpublished per curiam)(App.57)

In *Johnson*, the examiner at least identified which medication she wanted to administer to the individual—Haloperidol. Still the court of appeals held that the State failed to prove that it gave a "reasonable explanation" of the drug to the individual, and it expressly rejected the argument that it could "accept reasonable inferences" from the doctor's testimony that the explanation she gave satisfied *Melanie L.* and the statute. *Johnson*, ¶28.

Johnson held that the examiner failed to "***explain the details of the conversations*** she had with [the individual] ***regarding Haloperidol***, its advantages, and any alternatives to the medication." *Id.*, ¶31. (Emphasis supplied). The examiner also failed to provide the individual "***the details of the pros and cons*** and the psycho-education that were provided to Johnson as part of the reasonable explanation owed to Johnson in the face of being involuntarily medicated using Haloperidol." *Id.*, ¶32. (Emphasis supplied).

Importantly, the court of appeals did not absolve the State from eliciting the "details" of the explanation provided, even though Johnson, like Paul, contended that he is not mentally ill and does not require any medication. *Id.*, ¶31.

Circuit courts must determine the individual's competency to make medication or treatment decisions in almost every Chapter 51 proceeding. The decisions above are irreconcilable. The supreme court should grant review to resolve the conflict and thereby

clarify the kind of evidence a county must elicit to prove that an individual is incompetent to make medication or treatment decisions.

If the supreme court grants review, Paul will also argue that the County failed to carry its burden of proving that he is incapable of expressing or applying an understanding the advantages, disadvantages and alternatives to a particular medication under §51.61(1)(g)4a and b, *Virgil D.,* and *Melanie L.,* as he did in the court of appeals.

CONCLUSION

For the reasons state above, P.D.G. respectfully requests that the supreme court grant this petition for review.

Dated this 4th day of October, 2022.

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 5,977 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 4th day of October, 2022.

Signed:

COLLEEN D. BALL
Assistant State Public Defender