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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001281

In the matter of the mental commitment of D.J.S.:
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

D.J.S.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

D.J.S. appealed from the circuit court's orders for a chapter 51 involuntary recommitment and involuntary medication, arguing insufficiency of the evidence and that the court's oral ruling did not meet the requirements of *Langlade County v. D.J.W.*, 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277. In addition, D.J.S. argued in response to the county's arguments in support of the orders, that the county relied on inadmissible hearsay evidence. D.J.S. remains under the commitment, which began on May 10, 2022, and runs for twelve months.

1. Whether the county can meet its burden to establish dangerousness under Wis. Stat. § 51.20(1)(a)2. in a recommitment proceeding where it only presents vague, conclusory allegations and hearsay testimony from an expert examiner.

The court of appeals affirmed, concluding that the county met its burden to show by clear and convincing evidence that D.J.S. was currently dangerous.

2. Whether reasonable inferences satisfy the requirement, under *Langlade County v. D.J.W.*, 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277, that the circuit court make "specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based."

The circuit court explicitly based its dangerousness conclusion under Wis. Stat. § 51.20(1)(a)2.c. on assuptions, and otherwise relied on hearsay and facts not in the record at the final hearing. The court of appeals affirmed, concluding that the circuit court "reasonably inferred" that the evidence showed D.J.S. would be dangerous if treatment were withdrawn. *Winnebago County v. D.J.S.*, No. 2022AP1281, unpublished slip op. ¶14 (WI App Jan. 25, 2023). (App. 16-17).

3. Whether circuit courts may rely on hearsay and evidence outside the record at the final hearing in concluding that an individual is dangerous.

In response to the county's arguments regarding sufficiency of the evidence, D.J.S. argued that the county should not be permitted to rely on the inadmissible hearsay it had proffered to prove dangerousness. The court of appeals dismissed D.J.S.'s hearsay arguments in a footnote, declining to reach the issue. *D.J.S.*, slip op. ¶9 n.3. (App. 14).

CRITERIA FOR REVIEW

Review is warranted for three reasons. First, this case presents the Court with an opportunity to examine what constitutes sufficient proof of "dangerousness" in the context of a recommitment, and whether the hearsay testimony of an expert examiner alone can be sufficient evidence.

Second, this case presents the Court with an opportunity to revisit the directive from *D.J.W.*, that circuit courts must make specific factual findings. This will allow the Court to provide circuit courts with clarification on what constitutes sufficient factual findings to support a conclusion of dangerousness under the Wis. Stat. § 51.20(1)(a)2. subdivision paragraphs.

Review of these issues is warranted because the court of appeals misapplied Wis. Stat. § 51.20(1)(a)2.c., through the lens of para. (1)(am), to the evidence presented at the recommitment proceeding. In proving dangerousness under this standard, the county may prove the "pattern of recent acts or omissions" portion of subd. para. 2.c. by a showing that if treatment were withdrawn, based on D.J.S.'s treatment record, that there is a substantial likelihood that D.J.S. would be a proper subject for commitment. However, the para. (1)(am) standard does not eliminate the requirement for a "pattern" of acts or omissions in subd. para. 2.c. under *D.J.W.* The requirement of demonstrating a pattern by clear and convincing evidence is what distinguishes this standard from the others listed in Wis. Stat. § 51.20(1)(a)2.a.-e. However, neither the circuit court nor the court of appeals identified factual findings that constituted a "pattern" of acts to prove by clear and convincing evidence that there was a "substantial likelihood of physical impairment or injury" if treatment were withdrawn. Thus, this issue qualifies for review under Wis. Stat. § 809.62(1r)(d).

Third, this case presents the Court with an opportunity to examine the admissibility of hearsay in expert testimony, and hold that reliance on such hearsay to establish dangerousness is plain error. Counties routinely offer hearsay evidence via expert testimony on the issue of dangerousness, and circuit courts admit it. Sometimes the error is preserved, however, often times it is not. Presently, no published decisions apply the plain error doctrine in a chapter 51 appeal. This issue thus qualifies for review under § 809.62(1r)(c)2.

STATEMENT OF FACTS

On April 20, 2022, Winnebago County filed a Petition for Recommitment and for Involuntary Medication or Treatment, which sought to extend for twelve months D.J.S.'s involuntary civil commitment that otherwise would have expired on May 30, 2022. (2:1). The petition alleged that there was a "substantial likelihood . . . that [D.J.S.] would be a proper subject for commitment if treatment is withdrawn." (2:1).[1] The petition further alleged that D.J.S. would be dangerous under Wis. Stat. § 51.20(1)(a)2.c. (2:2).

The circuit court, the Honorable Scott C. Woldt, presiding, held D.J.S.'s recommitment hearing on May 10, 2022. The sole witness was Dr. Thomas Vicente, the treating psychiatrist.

[1] Referring to Wis. Stat. § 51.20(1)(am).

(21:2-3). The county did not admit a report into evidence.

Dr. Vicente testified that D.J.S. suffers from a mental illness, specifically from schizophrenia. (21:4-5). He explained that D.J.S.'s mental illness "grossly impair[s] his judgment, behavior and capacity to recognize reality." (21:5). As to dangerousness, Dr. Vicente stated "yes" when asked if it was his medical opinion that D.J.S. would become a proper subject for commitment if treatment were withdrawn. (21:5). Dr. Vicente stated that he checked the box for "C" on the form because when D.J.S. "has not been under commitment his -- he has -- hears auditory hallucinations that inform him to do things and, through those hallucinations and instructions by the hallucinations, he puts himself in dangerous situations." (21:5-6).[2]

As to the basis for his opinion on D.J.S.'s dangerousness, Dr. Vicente testified that in his review of "the records" he was aware of one "episode" that occurred within the last year. (21:6). Dr. Vicente stated that D.J.S. was found on a highway and would not respond to officers or his parents. He "believe[d]" that D.J.S. had entered into the traffic lanes. However, he did not know the name of the highway and did not know how long D.J.S. had been "out there." (21:6). But

[2] Option "C" on the petition for recommitment states in relevant part: "Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals."

he did know from the records that D.J.S.'s parents had called the police because D.J.S. was missing. (21:6). Dr. Vicente stated he based his opinion primarily on the highway incident from the records, and added, "Given his history, similar things have happened where these influences have commanded him to do things."

Dr. Vicente testified about another incident he "recall[ed]" from 2017, in which D.J.S. "tried to get into someone else's house at 11:30 at night because the voices were telling him that the people didn't belong there." (21:7). Dr. Vicente further stated: "[D.J.S.] was not under treatment at the time." (21:7).

As to the medication order, Dr. Vicente testified that D.J.S. was not competent to refuse medication. (21:7). Dr. Vicente testified he explained the advantages, disadvantages, and alternatives of accepting medication to D.J.S. (21:7-8). In Dr. Vicente's opinion, D.J.S. was not capable of expressing an understanding of those advantages, disadvantages, and alternatives. (21:8).

D.J.S.'s counsel argued that the county had not met its burden of proof as to dangerousness. (21:9-10). The county made no argument. The circuit court then found that D.J.S. suffers from a mental illness, schizophrenia, "which is a substantial disorder of thought, mood, and perception which grossly impairs his judgment, behavior and capacity to recognize reality when not under treatment." (21:10-11). As to dangerousness, the court concluded that D.J.S. would

become a proper subject for commitment if treatment were withdrawn. (21:11). The court specifically identified "the C Standard"[3] and made the following findings:

> [T]here is a pattern here of [D.J.S.] going on and off medications and him decompensating when he's off medication and doing things that are dangerous to himself.
>
> I think it's reasonable to assume that his parents wouldn't have called the police on [D.J.S.] if -- for wandering near a highway. I think they would call the police if he was in danger and that's why they did it and that's why the police brought him home, because he was in danger.

(21:11; App. 7).

The circuit court entered an order of extension of commitment[4] and, on the basis of Dr. Vicente's testimony, an order authorizing involuntary medication during the commitment.[5] (21:10-12; 10; 14; App. 3-4, 5, 6-8).

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[3] Referring to Wis. Stat. § 51.20(1)(a)2.c.

[4] The county submitted and the circuit court signed an outdated version of the order of extension of commitment, Wisconsin Form ME-911. (*See* 10:1-2). The form was updated in March 2022. *See* ME-911, 03/22, "Order of Commitment/ Extension of Commitment/Dismissal," available at: https://www.wicourts.gov/formdisplay/ME-911.pdf?formNumber=ME-911& formType=Form&formatId=2&language=en.

[5] D.J.S. did not separately challenge the medication order. However, the medication order is only effective during a lawful

D.J.S. appealed, arguing that (1) the county did not meet its burden to prove by clear and convincing evidence that D.J.S. would be dangerous under Wis. Stat. § 51.20(1)(a)2.c. if treatment were withdrawn; and (2) the circuit court's factual findings were clearly erroneous and do not meet the necessary requirements under *D.J.W.*

The county disagreed with D.J.S. on all grounds. In response to the county's specific arguments that the expert's testimony was admissible for the truth of the matters asserted, D.J.S. argued that the testimony in question was inadmissible hearsay.

The court of appeals affirmed in a one judge opinion. *D.J.S.*, slip op. (WI App Jan. 25, 2023). (App. 9-18). Specifically, the court held that, under Wis. Stat. § 51.20(1)(am), the "pattern of recent acts or omissions" under subd. para. (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[,]" thereby relieving the county of the burden to show facts related to the subd. para. (a)2.c. "pattern" standard.

As a result, the court of appeals only considered whether the county proved, "by clear and convincing evidence 'a substantial likelihood, based on [D.J.S.'s] treatment record, that [he] would be a proper subject for commitment if treatment were withdrawn,'

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commitment. *See* Wis. Stat. § 51.61(1)(g)3. Therefore, reversal of the commitment would also necessitate reversal of the medication order.

meaning, as relevant to this case, that 'there is a substantial probability of physical impairment or injury' to D.J.S. if treatment were withdrawn." *D.J.S.*, slip op. ¶7 (quoting Wis. Stat. § 51.20(1)(am), (1)(a)2.c. (alterations in original)). (App. 12-13).

As the court of appeals often does in chapter 51 cases, the court admonished that "it certainly would have been better if the County had presented more evidence and the circuit court had been more detailed and specific in its oral determination." *D.J.S.*, slip op. ¶¶9-12. (App. 14-16). Regardless, the court of appeals concluded that by calling only one expert witness, the county met its burden. *D.J.S.*, slip op. ¶¶13-14. (App. 16-17). Further, despite the circuit court's apparent melding together of different standards, the court of appeals searched the record and concluded that "[t]he totality of the evidence . . . supports the court's determination." *D.J.S.*, slip op. ¶13. (App. 16).

ARGUMENT

I. This Court should grant review to examine the county's burden to show, by clear and convincing evidence, that an individual is currently dangerous under the standard for recommitment.

A. The standard of dangerousness and how it functions at a recommitment hearing.

The five standards of dangerousness detailed in the statute require the county to "identify recent acts or omissions demonstrating that the individual is a danger to himself or to others" by clear and convincing evidence. *See* Wis. Stat. § 51.20(1)(a)2.a.-e.; *D.J.W.*, 391 Wis. 2d 231, ¶¶42-43.

When establishing recent acts of dangerousness for a recommitment, the county may demonstrate, based on treatment records, "that the individual would be a proper subject of commitment if treatment were withdrawn." Wis. Stat. § 51.20(1)(am). However, the county must still prove the individual is dangerous at each extension of a commitment. *D.J.W.*, 391 Wis. 2d 231, ¶¶33-34.

Here, after the county failed to argue the evidence was sufficient to establish dangerousness under Wis. Stat. § 51.20(1)(a)2.b., the court of appeals only considered whether the evidence was sufficient to establish Wis. Stat. § 51.20(1)(a)2.c.

In order to establish dangerousness under Wis. Stat. § 51.20(1)(am) and (1)(a)2.c. at a recommitment, the county must prove that if treatment were withdrawn D.J.S. would demonstrate such "impaired judgment, manifested by evidence of a pattern" of acts or omissions, as to create a "substantial probability of physical impairment or injury to himself or others." Wis. Stat. § 51.20(1)(a)2.c. Although the county may prove this standard of dangerousness through the lens of sub. (1)(am), the evidence of a pattern of acts still applies: "the requirements of a…pattern of recent acts or omissions under par. (a)2.c. or e . . . ." Wis. Stat. § 51.20(1)(am).

As reasoned by this Court in *D.J.W.*, the purpose of referencing the specific subdivision paragraph of the dangerousness standards is to (1) provide "clarity and extra protection to patients regarding the underlying basis for a recommitment," and (2) clarify issues raised on appeal and "ensure the soundness of judicial decision making, specifically with regard to challenges based on the sufficiency of the evidence." *D.J.W.*, 391 Wis. 2d 231, ¶¶42-45.

If there is insufficient evidence that the subject of a commitment is dangerous, then the commitment violates the person's right to substantive due process. *See O'Connor v. Donaldson*, 422 U.S. 563, 574-575 (1975). Wisconsin courts have repeatedly admonished that whether a person meets a mental health standard created by statute is a legal question for the court to answer, not a medical question for a doctor. For instance, "[t]he determination of competency to stand

trial is a judicial matter, and a finding is not to be made on the basis of rubber stamping the report of a psychiatrist." *State ex rel. Haskins v. Cnty. Ct. of Dodge Cnty.*, 62 Wis. 2d 250, 264, 214 N.W.2d 575 (1974); *see also*, *State v. Green*, 2022 WI 30, ¶13, 401 Wis. 2d 542, 973 N.W.2d 770. Similarly, "the standard rule is that insanity is a legal term, not a medical standard." *Storm v. Legion Ins. Co.*, 2003 WI 120, ¶41, 265 Wis. 2d 169, 665 N.W.2d 353. "[P]sychiatrists are not legal experts, they are medical experts[.]" *Roe v. State*, 95 Wis. 2d 226, 248, 290 N.W.2d 291, 302 (1980) (holding that psychiatrists are not competent to testify about defendant's specific intent).

In a similar vein, this Court has stressed that mental health "hearings cannot be perfunctory under the law. Attention to detail is important." *Outagamie County v. Melanie L.*, 2013 WI 67, ¶94, 349 Wis. 2d 148, 833 N.W.2d 607. With respect to the "dangerousness" element, the court of appeals has observed that "conclusory opinions parroting the statutory language without actually discussing dangerousness . . . are insufficient to prove dangerousness in an extension hearing." *Winnebago County v. S.H.*, 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761.

B. The court of appeals' decision conflicts with the Wis. Stat. § 51.20(1)(am), and supreme court precedent.

In this case, the court of appeals' decision found that the county proved by clear and convincing evidence that D.J.S. is dangerous. *D.J.S.*, slip op. ¶¶8-12. (App. 13-16). However, this conclusion is flawed.

Once again, the circuit court made its legal conclusions, and the court of appeals affirmed, both on the basis of an expert opinion alone. While the court of appeals noted that "it certainly would have been better if the County had presented more evidence and the circuit court had been more detailed and specific in its oral determination," it ultimately rubber stamped the opinion of a psychiatrist. *See D.J.S.*, slip op. ¶8. (App. 13-14).

What the court of appeals determined to be sufficient evidence of dangerousness in this case is very similar to the evidence found to be insufficient in *D.J.W.* In both instances, the fundamental evidence was that both patients had schizophrenia, that medication managed those symptoms, and that without medication, those symptoms would worsen. The county failed to meet its evidentiary burden because Dr. Vicente's testimony about D.J.S.'s history boiled down to vague, unsupported, conclusory assertions that he would end up in dangerous situations without the commitment. It is ultimately the court's role to determine if the evidence presented

meets the legal standard. Therefore, a conclusory opinion about any necessary element fails to meet the clear and convincing standard of proof to involuntarily commit and medicate an individual.

The third dangerousness standard, subd. 2.c., provides that an individual is dangerous if he or she:

> Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals.

Wis. Stat. § 51.20(1)(a)2.c. Therefore, to present sufficient evidence of dangerousness under subd. 2.c. in a recommitment, the county was required to show, by clear and convincing evidence, that D.J.S. "would '[e]vidence[ ] such impaired judgment . . . that there is a substantial probability of physical impairment or injury to himself or herself or other individuals' if treatment were withdrawn." *See D.J.W.*, 391 Wis. 2d 231, ¶56 (quoting Wis. Stat. § 51.20(1)(a)2.c.) (alterations in original).

The county's sole witness, D.J.S.'s treating psychiatrist, testified that he believed D.J.S. was dangerous because D.J.S. would "become a proper subject for commitment" if treatment were withdrawn. (21:5). Dr. Vicente testified he marked the box for subd. 2.c. on the petition because, "When [D.J.S.] has not been under commitment his -- he has -- hears auditory hallucinations that inform him to do things and, through those hallucinations and instructions by

the hallucinations, he puts himself in dangerous situations." (21:5-6).

Dr. Vicente specifically referenced an incident he was aware of from his review of "the records" that occurred "in August -- within the past year" where D.J.S. "was found wandering on a highway. . . ." (21:6). He did not know where this had occurred, how long D.J.S. had been "out there" or any other details of the incident. (21:6). However, he stated that "Given [D.J.S.'s] history, similar things have happened where these influences have commanded him to do things." (21:6). Dr. Vicente testified about one other incident as follows: "I recall another incident in which he tried to get into someone else's house at 11:30 at night because the voices were telling him that the people didn't belong there." (21:7). He testified that incident occurred in "approximately 2017, in September" and that D.J.S. "was not under treatment at the time."

This evidence amounts to little more than the doctor's conclusory opinion that D.J.S. was dangerous to himself. Dr. Vicente provided extremely vague hearsay evidence about two incidents he was aware of from D.J.S.'s "records." The county provided no evidence as to the source of that information, much less an actual fact witness, without which it was impossible for the circuit court to evaluate the details and context of those situations in order to find that D.J.S. was in danger, or would be in danger if the commitment was not extended.

The evidence did not establish a "pattern" to show that D.J.S. would have a substantial probability of physical impairment or injury to himself or others if treatment were withdrawn. Even if the evidence of these alleged events had been established by clear and convincing evidence—non-hearsay and/or with sufficient detail—one event that occurred in 2017, when D.J.S. was not receiving treatment, and one that occurred in August 2021, when D.J.S. was presumably under a commitment,[6] does not establish that D.J.S. would become dangerous under subd. 2.c. if treatment were withdrawn. Two discrete instances, four years apart, of different behavior (knocking on someone's door versus walking on a highway), are not a pattern.

Given the complete lack of detail Dr. Vicente provided about the two events he referenced, the county did not show a "substantial probability of physical impairment or injury to" D.J.S. or others. Knocking on someone's door, regardless of the time of day, is not an inherently dangerous action. It is therefore completely speculative (*i.e.*, not "clear and convincing") to assume that D.J.S. or anyone else was in danger during that event in September 2017.

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[6] Dr. Vicente testified that the highway incident he referenced had happened "in August -- within the past year," and that he had been treating D.J.S. "[s]ince about 2015." (21:6, 8). The final recommitment hearing took place on May 10, 2022. (21:1). Therefore, it is likely that D.J.S. was under a commitment in August 2021, unless it was his initial commitment (which would have been only six months long).

Nor does anything Dr. Vicente said about the August 2021 incident establish that D.J.S. or anyone else was in danger. Walking on a highway does not automatically put a person was in danger such that there is a "substantial probability" of harm. The county did not present evidence of the time of day, the clothing that D.J.S. was wearing, the speed limit on the highway, whether there was any traffic, where exactly D.J.S. was on the highway (shoulder or in a lane of traffic), or even what highway it was.

Further, Dr. Vicente's testimony that D.J.S. "hears auditory hallucinations" or "voices" simply supports the diagnosis that D.J.S. has schizophrenia. (21:5, 7). As the Wisconsin Supreme Court recognized in *D.J.W.*, "A diagnosis of schizophrenia, by itself, does not demonstrate the requisite 'substantial probability of physical impairment.'" *D.J.W.*, 391 Wis. 2d 231, ¶57 (quoting Wis. Stat. § 51.20(1)(a)2.c.). And, "If it did, the statutory elements of mental illness and dangerousness would be merely redundant. *Id.* Therefore, the county did not show by clear and convincing evidence, that D.J.S.'s judgment was so impaired, as manifested by evidence of a pattern of acts or omissions, that there is a substantial probability of physical impairment or injury to himself or others if treatment were withdrawn.

II. This Court should grant review to clarify that under *D.J.W.*, circuit courts must make sufficient, specific factual findings to establish dangerousness under one of the standards for recommitment.

As argued above, the court of appeals' decision conflicts with Wis. Stat. § 51.20(1)(am), and the supreme court precedent in *D.J.W.* In this case, at the close of the final hearing, the circuit court made factual findings that were either speculative or unsupported by the record, and are therefore clearly erroneous. In addition, while the court made reference to Wis. Stat. § 51.20(1)(a)2.c., it did not made specific factual findings to support a conclusion that D.J.S. was dangerous under subd. 2.c.

In *D.J.W.*, this Court mandated that going forward, circuit courts make "specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *D.J.W.*, 391 Wis. 2d 231, ¶40. The Court explained that the purpose of this requirement is twofold: (1) to provide "clarity and extra protection to patients regarding the underlying basis for a recommitment[,]" because in mental commitment proceedings, "such an important liberty interest [is] at stake[;]" and (2) to "clarify issues raised on appeal of recommitment orders and ensure the soundness of judicial decision making, specifically with regard to challenges based on the sufficiency of the evidence." *Id.*, ¶¶42-44 (citations omitted).

Here, the circuit court identified the "C Standard" and made the following factual findings as to dangerousness:

- "there is a pattern here of [D.J.S.] going on and off medications and him decompensating when he's off medication and doing things that are dangerous to himself."
- "I think it's reasonable to assume that his parents wouldn't have called the police on [D.J.S.] if -- for wandering near a highway.
- "I think they would call the police if he was in danger and that's why they did it and that's why the police brought him home, because he was in danger."

(21:11).

The circuit court's findings of fact are clearly erroneous. As to the court's first finding, there was no testimony or other evidence on the record at the final hearing of D.J.S. going on and off his medications. The county offered no evidence of what medication D.J.S. had been prescribed, when he began taking any medication, or any instance during which D.J.S. stopped taking a prescribed medication. The only evidence offered regarding D.J.S. possibly not being on medication was Dr. Vicente's testimony that D.J.S. "was not under treatment" in "approximately" September 2017. This simply does not establish that

D.J.S. ever went off any prescribed medications, that he would decompensate when he went off medications, or that he done dangerous things after going off any medications.

Second, the circuit court did not make a factual finding regarding what D.J.S. had actually done during the highway incident. Rather, the court stated it thought it was reasonable to assume that D.J.S.'s parents would not have called the police if he had been merely wandering near a highway. This is clearly erroneous, as it is an assumption based on hearsay testimony of what two unknown parties would have done. Moreover, even assuming the hearsay was correct, Dr. Vicente's testimony suggests that D.J.S.'s parents called the police because they did not know where he was. Therefore, they could not have known whether D.J.S. was on or merely near a highway.

The circuit court's third finding is also clearly erroneous as it is an assumption and is not supported by the record at the final hearing. Again, the court assumed—based on hearsay testimony that D.J.S.'s parents had called the police—that they had called the police because D.J.S. was in danger. That is not clear and convincing evidence that D.J.S. was in danger in that situation. The testimony was that D.J.S.'s parents "had called the police because he wandered off." (21:6). Therefore, the court's assumption about the subjective belief of D.J.S.'s parents, who did not know where he was or what he was doing, is irrelevant to whether D.J.S. was in danger at the time. It is also irrelevant to the issue of whether D.J.S. "evidences

such impaired judgment . . . that there is a substantial probability of physical impairment or injury to himself or herself or other individuals." *See* Wis. Stat. § 51.20(1)(a)2.c.

Therefore, the circuit court failed to make sufficient factual findings with respect to the specific dangerousness subdivision paragraph it identified. The factual findings made by the court are clearly erroneous. Accordingly, the court failed to make the requisite factual findings under *D.J.W.* and Wis. Stat. § 51.20(1)(a)2.c.

Rather than analyze the circuit court's factual findings under the directives of DJW, the court of appeals considered dangerousness evidence from the recommitment hearing "as a whole" and concluded that "[t]he totality of the evidence . . . supports the court's determination." *D.J.S.*, slip op. ¶13. The opinion therefore focuses not on whether the circuit court made the necessary "specific factual findings," but on Dr. Vicente's testimony. As a result, the court of appeals made additional inferences from the Dr. Vicente's hearsay testimony. The opinion does not consider whether the circuit court's assumptions, made in place of factual findings, were clearly erroneous.

III. The Court should grant review and hold that the plain error doctrine applies to the erroneous admission of hearsay evidence at a commitment proceeding in violation of individuals' due process rights guaranteed by the 14th Amendment.

A. Establishing the due process rights of individuals facing chapter 51 commitments answers a real and significant question of federal or state constitutional law.

The court of appeals in this case, and a number of other cases, have not addressed the establishment of procedural due process rights of individuals facing involuntary commitment in *Vitek v. Jones*, 445 U.S. 480, 492 (1980). By granting review, this Court can clarify a significant question of what constitutional rights chapter 51 committees have and how to address the violation of those rights on appeal.

1. Individuals undergoing civil commitments have procedural due process rights under the 14th Amendment.

Two cases set out the minimum due process rights for a person undergoing commitment: *Vitek* and *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972). The Wisconsin legislature codified some, but not all, of these rights in Wis. Stat. §§ 51.20(5), (10)(a) and (c), and 885.60(1) and (2)(a). The Wisconsin Supreme Court has approved *Lessard's* 14th

Amendment analysis. And *Vitek's* 14th Amendment analysis is binding on Wisconsin courts.

In *Vitek*, the United States Supreme Court considered whether prisoners have the same due process rights as "ordinary citizens" during commitment proceedings. In establishing so, it stated that the liberty interests of "ordinary citizens" would "undeniabl[y]" be "infringed absent compliance with the procedures required by the Due Process Clause." *Vitek*, 445 U.S. at 492-493.

The minimum due process rights *Vitek* afforded prisoners facing involuntary commitment proceedings were:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which the opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross examination;

D. An independent decision maker;

> E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
>
> F. Availability of legal counsel,[7] furnished by the state, if the inmate is financially unable to furnish his own; and
>
> G. Effective and timely notice of all the foregoing rights.

Vitek, 445 U.S. at 494-495 (quoting *Miller v. Vitek*, 437 F. Supp. 569, 575 (D. Neb. 1977)). (emphasis added); s*ee also, Lessard*, 349 F. Supp. at 1092-1103.

Vitek recognized that the government has a strong interest in segregating and treating mentally ill people. However, an "ordinary citizen" also has a powerful interest in not being "arbitrarily classified as mentally ill and subjected to unwelcome treatment." The due process rights it listed appropriately balance these competing interests. *Id.*, 445 U.S. at 495.

Therefore, United States Constitutional precedent exists to establish the minimum due process rights guaranteed to individuals facing ch. 51 commitments, including the right to confront and cross examine witnesses.

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[7] The right to legal counsel garnered only 4 votes. *Vitek v. Jones*, 445 U.S. 480, 499 (1980). However, individuals in Wisconsin subject to involuntary commitment under chapter 51 have the right to counsel under Wis. Stat. § 51.20(5).

2. The Court has yet to establish the due process rights of individuals facing chapter 51 commitments, and court of appeals' opinions have conflicted with *Vitek*.

In 2019, an individual argued that she had a due process right to appear in person at the final hearing in her chapter 51 case. This Court noted that it had "never directly considered this proposition." *Waukesha County v. S.L.L.*, 2019 WI 66, ¶33, 387 Wis. 2d 333, 929, N.W. 140. However, "we also do not doubt that ch. 51 proceedings are subject to the full complement of due process guarantees." *Id.*

The court of appeals has found differently. In *W.J.C. v. County of Vilas*, 124 Wis. 2d 238, 369 N.W.2d 162 (Ct. App. 1985), two doctors were permitted to testify by telephone over the subject individual's objection. The court of appeals held "[b]ecause this is a civil proceeding, however, no independent right to confront witnesses exists under the Wisconsin and United States Constitutions." *W.J.C.*, at 240. This published opinion does not address *Vitek's* holding that civil commitment proceedings do include the due process right to be heard in person and to confront and cross-examine witnesses. *Vitek*, 445 U.S. at 494.

In another published decision, *Walworth County v. Therese B.*, 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377, the court of appeals repeated their misstatement, relying on *W.J.C.* in a guardianship and protective placement appeal. The

court held that "[b]ecause this is a civil proceeding there is no independent right to confront and cross-examine witnesses under the state and federal constitutions." *Therese B.*, ¶10.

The court of appeals again rejected the argument that an individual had the due process right to be physically present at the recommitment hearing in an unpublished decision, *Price County DHHS v. Sondra F.*, No. 2013AP2790, unpublished slip op. (WI App May 28, 2014). (App. 19-28). The court held that, "The rights explicitly afforded to 'criminal defendants' under the Wisconsin and United States Constitutions do not apply to respondents in a Wis. Stat. ch. 51 proceeding." *Sondra F.*, slip op. ¶18 (citing *W.J.C.*, 124 Wis. 2d at 240). (App. 26-27).

Both *W.J.C.* and *Therese B.* are published decisions cited as authority in subsequent cases. And, although *Sondra F.* is an unpublished case, it has persuasive authority, and has been cited as such. *See Waukesha County v. W.E.L.*, No. 2018AP1486, unpublished slip op. ¶13 (WI App May 15, 2019). (App. 29-34). This series of cases, in addition to the present case, shows that this issue is likely to come before the court of appeals again.

This Court has not yet explicitly applied *Vitek* to a ch. 51 proceeding. Therefore, the Court should grant review in order to answer a real and significant question of federal and state constitutional law by establishing the minimum due process rights guaranteed to individual's facing ch. 51 commitments.

B. Establishing that the plain error doctrine applies to appeals from chapter 51 commitment orders is a novel issue.

1. The plain error doctrine and the rule against hearsay.

The plain error doctrine permits the court of appeals to review a claim of error that was not contemporaneously raised in the circuit court. *State v. Jorgenson*, 2008 WI 60, ¶1, 310 Wis. 2d 138, 754 N.W.2d 77. Wisconsin Stat. § 901.03(4) provides: "Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

A "plain error" is an error that is so "obvious and substantial" that a new trial or other relief must be granted even though it was not objected to at the time. *Jorgenson*, 310 Wis. 2d 138, ¶21. The doctrine may be used where a basic constitutional right has been denied—for example, when the admission of inadmissible evidence violates a defendant's right to confront and cross-examine witnesses. *Id.*, ¶34.

First, the appellant must show that "the unobjected to error is fundamental, obvious, and substantial." *Id.*, ¶23. Then the burden shifts to the county to prove that this error was harmless beyond a reasonable doubt. When determining whether a plain error was harmless, courts look at: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) whether

corroborating or contradicting evidence is present or absent; (4) whether the erroneously admitted evidence duplicated untainted evidence; (5) the nature of the defense; (6) the nature of the government's case; and (7) the overall strength of the government's case. *Id.*, ¶23.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. *See* Wis. Stat. § 908.01(3). Admitting hearsay implicates an individual's due process right to confront and cross-examine witnesses at a commitment hearing. *Vitek*, 445 U.S. at 494. Given the liberty interests at stake in commitment hearings, due process requires a strict adherence to the rule of evidence. *Lessard*, 349 F. Supp. at 1103. As such, hearsay is inadmissible evidence at a commitment hearing unless an exception applies. *See* Wis. Stat. §§ 908.02, 908.03.

Under the Rules of Evidence, an examining doctor is permitted to rely on inadmissible hearsay in forming his or her opinion, but the underlying hearsay is still inadmissible. *See* Wis. Stat. § 907.03; *S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 327-328, 457 N.W.2d 326 (Ct. App. 1990).

In *S.Y.*, an expert who had limited personal contact with the subject of a commitment proceeding testified that medical reports indicated that S.Y. had assaulted another person unprovoked. The medical records were neither authenticated at the commitment proceeding nor offered into evidence. *Id.* at 328. The

court of appeals held that the admission of the doctor's testimony about the alleged assault was erroneous. *Id.*

2. This Court should establish that the plain error doctrine applies to appeals from chapter 51 orders.

This Court should grant review and establish that the court of appeals can and should use the plain error doctrine to reverse a commitment grounded in hearsay for three primary reasons.

First, the admission of hearsay through treatment records and expert witnesses is a significant and recurring problem in civil proceedings like chapter 51 commitments, including the present case. Here, the county elicited hearsay evidence on the issue of D.J.S.'s alleged dangerousness. Defense counsel failed to object to the hearsay, and the circuit court recommitted him.

Second, it appears no published decisions have applied the plain error doctrine to an appeal from a ch. 51 commitment order. The Court's decision on that point would be the first.

Third, the rule against hearsay safeguards the individual's due process right to confront and cross-examine witnesses. *See Vitek*, 445 U.S. at 494. When hearsay is not contemporaneously objected to, the appellate lawyer has two options: file a post commitment motion alleging ineffective assistance of counsel or file a direct appeal and invoke a doctrine such as plain error.

Proceeding with ineffective assistance of counsel claims on appeals of ch. 51 commitments is a risky and often unrealistic option. The *Machner*[8] proceedings alone will likely conclude after the commitment order has expired, or will soon expire. Therefore, a supreme court decision establishing that the plain error doctrine applies to ch. 51 proceedings will allow review of unobjected to errors in a quicker and more meaningful way.

C. The circuit court committed plain error when it admitted hearsay evidence on the issue of D.J.S.'s alleged dangerousness.

This Court can and should apply the plain error doctrine to the erroneous admission of hearsay evidence in this case. At D.J.S.'s commitment proceedings, Dr. Vicente—an expert with limited personal contact with D.J.S.—testified about two incidents, one in which D.J.S. allegedly walked on a highway and one in which he allegedly knocked on a stranger's door at night. The county presented this testimony despite the fact that Dr. Vicente had no personal knowledge of what happened, as he specifically testified that he knew of these incidents from the "reports." Dr. Vicente could therefore only describe the incidents in general terms.

The county failed to introduce or authenticate any records that included information about these alleged incidents. Nor did the county present any

[8] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

witnesses who observed these alleged incidents. Instead, the county used Dr. Vicente's testimony alone as proof of D.J.S.'s current dangerousness.

While Dr. Vicente may form his professional opinion about D.J.S.'s mental illness based on hearsay, the hearsay evidence is not admissible evidence at the final hearing. His testimony was based almost entirely on D.J.S.'s treatment records, however, those records were not authenticated or offered into evidence. *See S.Y.*, 162 Wis. 2d at 328. Dr. Vicente's position as an expert witness "does not allow him to introduce inadmissible hearsay evidence." *See id.*

The admission of this hearsay evidence was a fundamental, obvious, and substantial error. D.J.S. never had the opportunity to cross-examine the people who allegedly made any out-of-court statements about his dangerousness—including what may or may not have happened during the highway incident, when his parents called the police to help locate him, or when he knocked on someone's door. Nor did the county seek to establish that D.J.S. had provided this information directly to Dr. Vicente, or authenticate any part of D.J.S.'s treatment records related to his alleged behavior and statements.

The county's failure to abide by the basic rules of evidence and the circuit court's acceptance of hearsay evidence was erroneous and violated D.J.S.'s substantial due process rights to cross examine and confront the evidence presented against him at the

recommitment hearing. The plain error doctrine thus warrants a reversal of D.J.S.'s commitment.

CONCLUSION

For the reasons stated above, D.J.S. respectfully requests that this Court grant this petition for review.

Dated this 24th 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 6,747 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including 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 24th day of February, 2023.

Signed:

LAURA M. FORCE
Assistant State Public Defender