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March 20, 2023

Sheila T. Reiff
Clerk, Wisconsin Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688

RE: Petitioner-Respondent's Letter Response to D.J.S.'s Petition for Review
In the Matter of the Mental Commitment of D.J.S.
Winnebago County v. D.J.S.
Appeal No. 2022AP1281; Winnebago County Case Number: 2022ME134

Dear Clerk Reiff,

The purpose of this letter is to move the Court to deny D.J.S.'s Petition for Review because this Court's primary function is to clarify or interpret the law, not review facts, review issues forfeited at trial or review discretionary acts of the court. "Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented." Wis. Stat. § 809.62(1r). No such reasons have been presented by D.J.S.. Nor have the criteria in Wis. Stat. § 809.62(1r) been met. In fact, Petitioner raises several issues for this Court to consider that were forfeited at both the trial and appellate levels.

The Petition at issue does not present real and significant questions of federal or state constitutional law that were properly pleaded and decided in the courts below. Petitioner raises

constitutional issues on pages 15 and 26 of his Petition that were not raised first at the trial and appellate levels and were, therefore, forfeited. D.J.S. cannot successfully suggest, for the first time, to this Court that the standard of review a reviewing court applies to discretionary decisions of the trial court is unconstitutional in Chapter 51 proceedings. Replacing the harmless error doctrine with the plain error doctrine in Chapter 51 cases is a new theory with constitutional underpinnings that must first be considered by the trial court and reviewed by the Court of Appeals. This did not occur.

A decision by this Court in this case will not help develop, clarify or harmonize the rules of evidence, the law of dangerousness in involuntary commitment cases, nor the standards of review applied to discretionary decisions of the court. In his brief-in-chief, D.J.S. presented a basic sufficiency of the evidence argument. The Court of Appeals reviewed the court's decision following a trial to the court with one expert witness presented by the County, no hearsay objections raised by adversary counsel and no testimony presented in defense of D.J.S.. The petition for recommitment alleged, among other things, that D.J.S. was dangerous under the recommitment and C standards. Wis. Stats. §§ 51.20(1am) and 51.20(1)(a)2.c.. The doctor who requested the recommitment testified that he had treated D.J.S. for seven years. He provided opinion testimony, pursuant to Wis. Stat. § 907.03, that D.J.S. was dangerous and provided examples of dangerous behavior. After hearing the testimony and arguments of counsel, the trial court determined the doctor was credible and agreed with his opinion. In his oral decision, the court followed this Court's recent directives in *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277, and made specific factual findings and identified the dangerousness standard he relied on. Even though D.J.S. forfeited the issue of hearsay at trial and in his brief-in-chief, D.J.S. attempted to introduce the issue of hearsay in his reply brief for the first time. As noted in its unpublished decision, the Court of Appeals intentionally did not consider the new hearsay argument. See *Allen v. Allen*, 78 Wis.2d 263, 270, 254 N.W.2d 244 (1977) ("A failure to make a timely objection constitutes a [forfeiture] of the objection."); *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (an appellate court will not address arguments raised for the first time in a reply brief).

Understanding that a response to D.J.S.'s Petition is optional per Wis. Stat. § 809.62(3), it is the County's preference to file a response when such Petitions are filed. The County's letter response in this matter, however, was not filed within 14 days after the e-filing of D.J.S.'s Petition for the following reasons. First, the attorney assigned to this case is no longer with the Winnebago County Office of Corporation Counsel. He did not leave instructions with undersigned counsel about the status of this case, nor did he file a motion to withdraw and substitute counsel prior to his departure. I did not receive electronic notice of the filing of this Petition for Review. I did not learn of this until last Tuesday, March 14, 2023. Second, the paralegal that received electronic notices of appellate cases left this office two weeks before the attorney originally assigned to this case and she did not train her replacement how to manage appellate files and appellate time limits. I am responding to this Petition within one week of learning of the Petition, and respectfully request that this Court consider our Response, despite its untimely filing.

Sincerely,

Catherine B. Scherer
Assistant Corporation Counsel for Winnebago County

cc: Attorney Laura M. Force, Assistant State Public Defender
File

STATE OF WISCONSIN

SUPREME COURT

For Official Use Only

IN THE MATTER OF THE MENTAL COMMITMENT OF:

D.J.S.

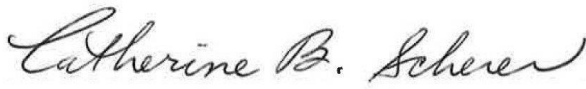
(DOB: 06/21/1984)

Case Number: 2022ME134
2022AP1281

CERTIFICATION OF FORM AND CONTENT

I hereby certify that the physical copies of this letter in response to D.J.S.'s Petition for Review are identical in form and content to the electronic copy filed with the Clerk of the Wisconsin Supreme Court on March 20, 2023.

Date: March 20, 2023



Catherine B. Scherer
Assistant Corporation Counsel for Winnebago County