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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP0001563-FT

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*In the matter of the mental commitment of T.M.S.*:
CALUMET COUNTY DH & HS,

Petitioner-Respondent,

v.

T.M.S.,

Respondent-Appellant-Petitioner.

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# PETITION FOR REVIEW

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COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
marionc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

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## ISSUE PRESENTED

In its oral ruling at T.M.S.'s Chapter 51 recommitment hearing, the circuit court determined that the third standard of dangerousness would be met if treatment were withdrawn. *See* Wis. Stat. § 51.20(1)(a)2.c. (third standard). The standard court form order[1] contained checkmarks for both the third and fourth standards. *See* Wis. Stat. § 51.20(1)(a)2.d. (fourth standard).

The issue presented is:

> Whether the court of appeals properly affirmed the recommitment order based on the fourth standard of dangerousness, despite the fact that in its oral ruling, circuit court stated that the third standard was met.

The circuit court's oral ruling was based on the third standard of dangerousness. However, the standard court form order contains checked boxes for both the third and fourth standards. (R.123; App.13).

The court of appeals concluded that the circuit court's ruling was based on both the third and fourth standards because of the checked boxes on the standard court form order, and concluded that the evidence was sufficient under the fourth standard. The

[1] ME-911 (03/22) (*available at* wicourts.gov.). This form was developed following this Court's decision in *Langlade Cty. v. D.J.W.*, 2020 WI 41, ¶3, 391 Wis. 2d 231, 942 N.W.2d 277.

court of appeals did not determine whether the evidence was sufficient under the third standard.

## CRITERIA FOR REVIEW

Review is warranted under Wis. Stat. § 809.62(1r)(a) because the case involves a real and significant question of constitutional law. *See Addington v. Texas*, 441 U.S. 418, 425 (1979) (discussing the essential liberty interests at stake in a civil commitment). In addition, the question presented—whether a reviewing court may rely on the new standard court form order where the court's oral ruling was on a different legal ground—is a legal question that is likely to recur. *See* Wis. Stat. § 809.62(1r)(c)3. Committing courts will uniformly be using the new standard court form order.[2] Issues regarding the court form order will arise in other appeals. *E.g. Barron County v. K.L.*, No. 2022AP502, unpublished slip op. ¶22 (Feb. 7, 2023) (affirming the recommitment even though the court did not explicitly reference a dangerousness standard in its oral ruling, because the court's written order checked boxes for the third and fourth standards.). (App. 74-84).

[2] 807.001 Forms. (1) "In all civil actions and proceedings in circuit court, the parties and court officials shall use the standard court forms adopted by the judicial conference …"

## STATEMENT OF THE CASE AND FACTS

On January 11, 2022, Calumet County filed a Chapter 51 petition for recommitment and motion for involuntary medication and treatment. (R.108, R. 111). The circuit court appointed Dr. Marshall Bales to conduct an examination of T.M.S.[3] (R.113). On February 16, 2022, Dr. Bales filed his examiner's report. (R.119). He also filed a statement for involuntary medication. (R.120). On February 21, 2022, the circuit court held an evidentiary hearing. (R.239:1-58; App.16-73).

Dr. Bales testified that, on February 15, 2022, he phoned T.M.S at the Tomah Veteran's Association Hospital (VA) to conduct an evaluation. (R.239:7; App.22). Dr. Bales told T.M.S. why he was contacting him. (*Id.*). Dr. Bales explained T.M.S.'s rights to him, and T.M.S. appeared to understand. T.M.S. was aware of the judge's name and understood that this was a court evaluation for both the guardianship and "51." (R.239:8; App.23). Dr. Bales had conducted numerous court evaluations of T.M.S. in the past. (R.239:6; App.21).

Initially, T.M.S. declined to "meet," but when Dr. Bales phoned him again later that day, T.M.S. spoke with him for about ten minutes before ending

[3] The County had also filed a petition for annual review of a Chapter 55 Protective Placement, and Dr. Bales evaluated T.M.S. for that purpose as well. *See* Calumet County Case No. 15-GN-15. However, the Chapter 55 order was not appealed.

the call. (R.239:7; App.22). T.M.S. was friendly and cordial. (R.239:7-8; App.22-23). In addition to the interview, Dr. Bales also reviewed T.M.S.'s treatment records and previous evaluations, and spoke to T.M.S.'s nurse. (R.239:7; App.22). At the time of the examination, T.M.S. was taking mental health medications. (R.239:8; App.23).

Dr. Bales testified that T.M.S. was thought-disordered during the call and could not speak coherently. (R.239:9; App.24). Dr. Bales testified that T.M.S. spoke in very long words that are not found in the dictionary, and will intersperse them in conversation. (R.239:10; App.25). T.M.S. is diagnosed with schizoaffective disorder, which is a substantial disorder of thought, mood, and perception. (R.239:9; App.24). T.M.S. did not threaten Dr. Bales, and he was not suicidal. (*Id.*). However, Dr. Bales' "concern" was, "[s]tandard 4. He just is not going to be able to function in the community safely in his current mental state."[4] (*Id.*).

When the County asked Dr. Bales if he had, "formed an opinion as to whether because of his mental illness there's a substantial probability that he might - - he won't be able to take care of himself or he may be a threat to others," Dr. Bales answered, "[b]oth." (*Id.).* Dr. Bales testified that T.M.S. would "not be able to properly care for himself." (*Id.*). In addition, "[i]n the past he's become threatening to other people, especially when there's been any kind of

[4] *See* Wis. Stat. § 51.20(1)(a)2.d.

alcohol or drug use." (*Id.*). Dr. Bales continued, "[h]e will not take his medicine properly and he will either become dangerous or endangered." (*Id.*).

When asked why he thought T.M.S. could not take care of himself, Dr. Bales responded that T.M.S. could not speak coherently and was disordered or disorganized in his thinking. (R.239:11; App.26). Dr. Bales testified that he did not think T.M.S. would be able to take his medications properly, go shopping, or make dinner for himself. (*Id.*). He did not believe that T.M.S. would be able to work. (R.239:17; App.32). Dr. Bales testified that T.M.S. was in forced remission from street drugs, but even with the medications, Dr. Bales did not think he would be safe in the community, even for a week. (R.239:12; App.27). Dr. Bales testified that there would be police contact or crisis contact and it would be catastrophic. (R.239:13, 26; App.28, 41). Dr. Bales believed that T.M.S. would possibly use drugs and become homeless. (R.239:26; App.41).

When asked whether he could "point to any specific information in the records you've reviewed that indicate that he's presently dangerous," Dr. Bales answered, "[n]o." (R.239:22; App.37). T.M.S. had not been assaultive. (*Id.*). He had not attempted suicide. (*Id.*). He had not harmed himself. (*Id.*). Dr. Bales acknowledged that T.M.S. had not been dangerous lately. (R.239:27; App.42).

Dr. Bales testified that the VA hospital was "ideal" for T.M.S. (R.239:19; App.34). He testified that,

at best, T.M.S. could live in a group home with around-the-clock supervision and a controlled egress and medication monitoring. (R.239:24; App.39). Dr. Bales was aware that T.M.S. wanted to return to Chilton, but Dr. Bales did "not know of any setting that would be as good as where he is…" (*Id.*). Dr. Bales acknowledged that the VA is unlocked and there was no evidence that T.M.S. had ever attempted to elope. (R.239:21; App.36). Due to COVID protocols at the VA, for the past two years no one had been allowed out of the building without staff supervision. (R.239:35; App.50). T.M.S. previously could come and go for cigarette breaks. Now he needed someone with him at all time and the "the staff just do not have the time to continue to go out on a daily basis." (*Id.*). Residents were only allowed outside "once or twice a week," and these restrictions had an impact on residents' mental health. (R.239:35, 42; App.50, 57).

Dr. Bales recommended an involuntary medication order. (R.239:13; App.28.). He testified that T.M.S. could not express or apply "the medication review" to his own condition. (R.239:12; App.27). Dr. Bales testified that he explained the advantages, disadvantages, and alternatives to accepting medication or treatment, but T.M.S. was not able to express an understanding of this information or apply an understanding of this information, so as to make an informed choice about whether to accept or refuse the medication. (R.239:14; App.29). Dr. Bales testified that T.M.S. lacked insight into his condition because he did not believe that he had a mental issue. (R.239:16; App.31).

Ms. Kim Hopp, a social worker for Calumet County, also testified. (R.239:29; App.44). She testified that when she spoke to T.M.S., he was upset, but coherent in answering her questions. (R.239:30; App.45). Ms. Hopp testified that T.M.S. had sufficient money to cover his own expenses. (R.239:31; App.46). Ms. Hopp did not believe that T.M.S. was able to take care of himself. He wandered around the unit and, according to staff, needed prompting for hygiene and activities. (*Id.*). Ms. Hopp testified that T.M.S. was "a loner, and he usually will talk about things that have happened in the past…" (*Id.*). T.M.S. indicated that he felt like "a prisoner" and wanted to know "why he's at this place." (R.239:32; App.47). He spoke gruffly and got close to people when upset, but was good about being redirected. (R.239:43; App.58).

Ms. Hopp testified that everyone at the VA liked having T.M.S. there, and enjoyed working with him. (R.239:45; App.60). Ms. Hopp did not believe that T.M.S. would take his medication on his own. (R.239:32; App.47). She believed that he could purchase food for himself; however, she did not think he would make healthy choices. (R.239:33; App.48). She did not think he would pay his bills. (*Id.*). However, there is a guardianship in place and his guardian could be responsible for his bills. (R.239:4, 37; App.52). Ms. Hopp did not believe there was a "CBRF" available that would meet T.M.S.'s needs because she had unsuccessfully looked for one in the past for other individuals. (R.239:34; App.49).

The County initially argued that T.M.S. was dangerous to himself because he would "not be able to take care of himself" if not on commitment. (R.239:50; App.65). However, after the defense argument, the County stated it would "change" its position on dangerousness to, "the third box, a substantial probability of physical impairment or injury to himself or others due to this impaired judgment." (R.239:52; App.67). The County argued that, under this standard, T.M.S. would be a proper subject for commitment if treatment were withdrawn. (R.239:52-53; App.67-68). In addition, the County argued that T.M.S. was not competent to refuse treatment. (R.239:50; App.65). The County requested a twelve-month extension of commitment as well as an involuntary medication order. (*Id*.).

Defense counsel argued that the County failed to meet its burden of proof on dangerousness. (R.239:51; App.66). There was nothing in recent records suggesting that T.M.S. was physically dangerous to himself or others. Any alleged threatening behavior was dated. (*Id*.). In addition, there had been "no specific tieback to a particular dangerous incident. It's mostly general and hypothetical testimony about what would happen for [T.M.S.] if he doesn't have the guardianship and if he doesn't have some of the supervision and oversight." (*Id*.).

The court ruled as follows:

> Here the Court received testimony from Dr. Bales that [T.M.S.] continues to suffer from a mental illness, that being schizoaffective disorder. It's a substantial disorder of thought, mood, or perception. There doesn't seem to be any real objection to that particular observation by the doctor.
>
> The doctor further testified that there's a substantial probability that [T.M.S.] would not be able to care for himself, and based upon his history, without treatment, in a very short period of time he would decompensate and end up being either a danger to himself or endangered himself. Specifically when the Court asked the doctor what would happen if [T.M.S.] was no longer subject to the treatment orders and just dropped off in Hilbert, the doctor indicated that he would be homeless, unable to provide shelter for himself, take care of his needs. And given his tendency just to kind of wander around, this would put [T.M.S.] in a substantial probability of death or serious physical injury. You know, we're going to be in the single digits for low temperatures for the next ten days, and even when things warm up, [T.M.S.] has demonstrated an inability to care for himself.
>
> So the Court is going to find that grounds for extension of the commitment have been established. [T.M.S.] continues to suffer from a mental illness. The doctor has testified that he is a proper subject for treatment. *The Court is going to find dangerousness in that there is a substantial probability of physical impairment or injury to himself due to his impaired judgment and, quite frankly, inability to communicate, as shown by the substantial likelihood that based on the subject's -*

> *- on [T.M.S.]'s individual treatment records that he would be a proper subject for commitment if treatment were withdrawn.* [T.M.S.] is a resident of Calumet County.
>
> The Court is going to order an extension of the commitment for a twelve-month period of time. The Court did not receive any testimony that [T.M.S.] required a locked treatment facility. That will not be part of the Court's order.

(R.239:54-56; App.69-71) (emphasis added).

The court further determined that T.M.S. was not competent to refuse medication. (*See* R.239:56; App.71). On February 2, 2022, the court entered a written Order for Extension of Commitment. The order was on the standard court form order, ME-911 (*available at* wicourts.gov.). (R.123; App.13-14). It contained checked boxes for both the third and fourth standards of dangerousness. The court also entered an Order for Involuntary Medication and Treatment. (R.124; App.15). T.M.S. appealed from these orders. [5]

In the court of appeals, T.M.S. argued that the County failed to present sufficient evidence that he was dangerous to himself or others. T.M.S. argued specifically about the third standard of dangerousness, Wis. Stat. § 51.20(1)(a)2.c., as viewed through the lens of the recommitment standard, Wis. Stat.

[5] The appeal did not challenge the medication order on independent grounds. However, the medication order it is tied to the commitment order and will be reversed if the recommitment order is reversed. *See* Wis. Stat. § 51.61(1)(g)3.

§ 51.20(1)(am). He focused his argument on this standard because it was the standard that the circuit court referenced in its oral ruling. It was also the standard that the County argued at the hearing. (R.239:52; App.67).

The County's Respondent's Brief noted that the court form indicated both standards three and four, and that the evidence was sufficient under both standards. (Respondent's Brief at 5). T.M.S.'s Reply Brief argued that the court of appeals should only review the third standard, because the circuit court's oral ruling was based on the third standard. (Reply Brief at 3-4). He also argued that the evidence was insufficient under the fourth standard. (*Id*. at 7-9)

The court of appeals affirmed after finding that the evidence was sufficient to meet the fourth standard. The court declined to reach the third standard, "[b]ecause this court's review demonstrates there is evidence to support a link to the fourth dangerousness standard, it is not necessary to address the third standard." *Calumet County DH &HS v. T.M.S.*, No. 2022AP1563-FT, unpublished slip op., ¶12 (Jan. 11, 2023). (App.3-12). The court of appeals held:

> This court's review of the Record demonstrates there is sufficient evidence to support a link to the fourth dangerousness standard. Dr. Bales's testimony and report, together with Hopp's testimony, were sufficient. The doctor opined that, without the commitment, T.M.S. would go off his medication, be unable to take care of his basic needs, and become dangerous to himself (or

> others). His report said T.M.S. would "almost certainly" become "suicidal or homicidal or threatening[.]" Hopp confirmed that if the commitment was not extended, T.M.S. would not take his medication and also confirmed that T.M.S. is not capable of caring for his own basic needs. The doctor testified that withdrawing treatment would be "catastrophic" and that within two weeks at most, he would be homeless and unable to find his way to a homeless shelter. Dr. Bales explained that T.M.S. is unable to communicate effectively and does not understand that he has a mental illness. Hopp explained that T.M.S.'s aggression is tempered because the staff of the facility where he is currently committed intervenes to squelch escalation. The Record therefore supports the circuit court's decision.

*T.M.S.*, No. 2022AP1563-FT, ¶14. (App. 10-11).

In a footnote, the court of appeals addressed the "discrepancy" about the standards of dangerousness.

> The Record contains some discrepancy as to which of the WIS. STAT. § 51.20(1)(a)2 dangerousness standards provides the link to T.M.S.'s dangerousness under § 51.20(1)(am). Dr. Bales's report links to § 51.20(1)(a)2.b, the second standard, and § 51.20(1)(a)2.d, the fourth standard. At the evidentiary hearing, Dr. Bales's testimony focused primarily on the fourth dangerousness standard. In its closing argument, the County claimed that T.M.S. is dangerous under § 51.20(1)(a)2.c—the third dangerousness standard. This discrepancy is of no import as it was resolved when the circuit court ultimately found T.M.S. dangerous under both the third and

> fourth dangerousness standards as reflected in its order.

*Id.*, ¶4 n4. (App.5).

This petition for review follows.

## ARGUMENT

### The evidence was insufficient to support a finding that T.M.S. was dangerous to himself or others under the third standard, which is the standard that the circuit court relied upon in its oral ruling.

A. Standard of review and legal standard.

This Court reviews a circuit court's findings of fact for clear error, but independently determines whether the facts satisfy the legal standard. *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. Involuntary commitments are civil proceedings; however, given the essential liberty interests at stake, due process requires the petitioner to prove its case by clear and convincing evidence. *Addington*, 441 U.S. at 433; Wis. Stat. § 51.20(13)(e).

The County must prove that the individual is mentally ill, a proper subject for treatment, and dangerous to self or others. *Portage Cty. v. J.W.K.*, 2019 WI 54, ¶17-18, 386 Wis. 2d 672, 927 N.W.2d 509. For purposes of this appeal, T.M.S. does not challenge the sufficiency of the evidence that he is mentally ill and that his mental illness is treatable. To prove

dangerousness in an *original* commitment, the County must satisfy one or more of the five standards of dangerousness set forth in Wis. Stat. § 51.20(1)(a)2.a.-e. These standards require proof of recent acts or omissions demonstrating that the respondent poses a risk of serious physical harm to self or others. *See J.W.K.*, 386 Wis. 2d 672, ¶17. To prove dangerousness in a *recommitment,* the County may meet its burden without showing recent dangerous acts or omissions if there is "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." Wis. Stat. § 51.20(1)(am).

In a recommitment proceeding the County must still prove "current dangerousness" as measured by at least one of the five statutory standards of dangerousness. *J.W.K.*, 386 Wis. 2d 672, ¶24 (emphasis in original). In addition, the circuit court is required to "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.

B. The County failed to prove that T.M.S. was dangerous under the third standard of dangerousness.

In its oral ruling, the circuit court determined that the third standard of dangerousness was established, as viewed through the lens of the recommitment standard. *See* Wis. Stat.

§§ 51.20(1)(a)2.c. and 51.20(1)(am). (R.239:54-56; App.69-71). The third standard requires proof that the individual is dangerous because 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." The term "substantial probability" is defined as "much more likely than not." *Marathon Cty v. D.K.*, 2020 WI 8, ¶72, 390 Wis. 2d 50, 937 N.W.2d 90.

Although the circuit court did not provide the statutory citation, it explicitly found, "a substantial probability of physical impairment or injury to himself due to his impaired judgment and, quite frankly, inability to communicate, as shown by . . . [T.M.S.]'s individual treatment records that he would be a proper subject for commitment if treatment were withdrawn." (R.239:56; App.70). This language mirrors the third standard, Wis. Stat. § 51.20(1)(a)2.c.

The evidence does not meet the third standard of dangerousness. As trial counsel argued at the hearing, there was nothing in recent records suggesting that T.M.S. was currently dangerous to himself or others. Any alleged threatening behavior was dated. (R.239:51; App.66). There had been "no specific tieback to a particular dangerous incident. It's mostly general and hypothetical testimony about what would happen for [T.M.S.] if he doesn't have the guardianship and if he doesn't have some of the supervision and oversight." (*Id.*). Significantly, there

was no evidence presented that T.M.S. had ever caused himself physical harm in the past.

The circuit court relied on the fact that Dr. Bales testified that T.M.S. would be homeless if not under commitment. (R.239:55; App.70). The court was concerned that, "we're going to be in the 16 single digits…and even when things warm up, [T.M.S.] has demonstrated an inability to care for himself." (*Id.*). However, T.M.S. has a corporate guardian who can manage his finances. (R.239:36; App.51). The record suggests that T.M.S. has social security benefits. (R.239:38; App. 53). Furthermore, Kim Hopp testified that T.M.S. "does have assets." (R.239:46; App.61). T.M.S. is under a Chapter 55 protective placement. (R.239:47; App.62). He did not contest the protective placement in the circuit court or on appeal.

The fact that T.M.S. has resources and services would militate against a conclusion that it was much more likely than not that he would become homeless. In addition, it is not per se dangerous to be homeless. The court was concerned about the cold weather. However, there was no evidence that T.M.S. could not stay in his present setting or that there are no homeless shelters available in the area. Dr. Bales and Ms. Hopp both testified that they did not believe that T.M.S. would continue his mental health medications. (R.239:11, 32; App.26, 47). Dr. Bales testified that T.M.S. does not believe he has a mental issue. (R.239:16; App.31). However, there was no evidence that T.M.S. told Dr. Bales or others that he would stop taking the medication.

The court discussed Dr. Bales' testimony but did not find Ms. Hopp not credible, and her testimony was not consistent with Dr. Bales' testimony in all respects. Dr. Bales testified that T.M.S. could not speak coherently. (R.239:9; App.24). Ms. Hopp testified that T.M.S. *was* coherent, albeit upset. (R.239:30; App.45). Dr. Bales did not believe that T.M.S. could grocery shop for himself. (R.239:11; App.26). Ms. Hopp believed that he *could* grocery shop, although she did not believe he would make healthy choices. (R.239:33; App.48). Neither Dr. Bales nor Ms. Hopp believed that T.M.S. could manage his daily medications. (R.239:11; App.26). However, there was no evidence that his needs could not be met by the guardianship and protective placement, or other services.

In sum, there was insufficient evidence to meet the third standard under Wis. Stat. § 51.20(1)(a)2.c.

C. The court of appeals should not have relied on the fourth standard of dangerousness because the circuit court's oral ruling was based on the third standard.

The court of appeals determined that T.M.S. was dangerous according to the fourth standard, Wis. Stat. § 51.20(1)(a)2.d. *T.M.S.*, No. 2022AP1563-FT, ¶14. (App. 10-11). It found that the circuit court had relied on this standard, in addition to the third standard, given that the court form order checked boxes for both. *Id.*, ¶4 n4. (App.5). (*See* R.123:1; App.13).

At the hearing, the circuit court referenced the language from the fourth standard, but this was in the context of describing this Court's holding in *D.J.W.* The discussion was in response to trial counsel's argument that *D.J.W.* required the court to make a finding of recent dangerous acts. (R.239:54; App.69). The court also summarized Dr. Bales' testimony that the doctor believed that T.M.S. would not be able to care for himself and decompensate and "end up being either a danger to himself or endanger himself," and be "in a substantial probability of death or serious physical injury." (R.239:55; App. 70). The court then determined that T.M.S. had "demonstrated an inability to care for himself." (*Id.*). However, the court did *not* make its own finding that "a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue . . ." *See* Wis. Stat. § 51.20(1)(a)2.d. (the fourth standard).

Instead, when issuing its oral ruling, the court used the language of the third standard, finding: "[t]he Court is going to find dangerousness in that there is a substantial probability of physical impairment or injury to himself due to his impaired judgment." (R.239:55; App.70). *See* Wis. Stat. § 51.20(1)(a)2.c.

True, the court form order contains checked boxes for both the third and fourth standards. (R.123; App. 13-14). The record does not indicate how or why that occurred. It could have been a scrivener's error. The court's oral ruling should govern because it was an unambiguous oral ruling. In a criminal case, "when

an unambiguous oral pronouncement at sentencing conflicts with an equally unambiguous pronouncement in the judgment of conviction, the oral pronouncement controls." *State v. Lipke*, 186 Wis.2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994). There is no reason why a different rule should apply here.

If a circuit court does not give an oral ruling making factual findings and linking them to the legal standard, this does not accord with *D.J.W.* Circuit courts are required to "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 (emphasis added). Although the standard court form order contains legal standards, it does not include individualized factual findings.

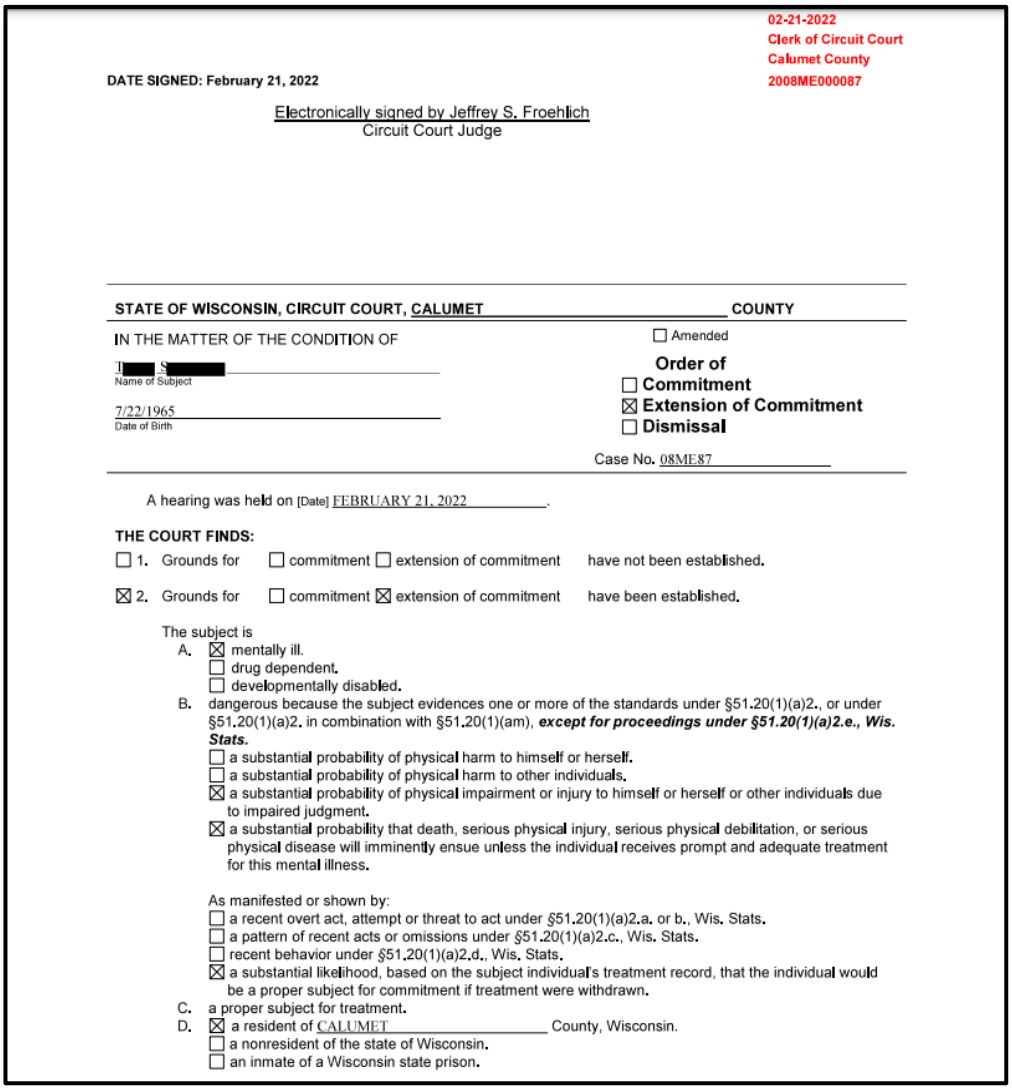
*D.J.W.*'s findings requirement is intended to provide "clarity" and "extra protection" to committed individuals. *Id.*, ¶¶43-44. Allowing a court form order to prevail over the circuit court's oral ruling creates confusion and deprives the committed person clarity. A person would need to scrutinize the court form in order to determine that their commitment rests on a legal standard that the court did not base its ruling on at the hearing.

*D.J.W.* further determined that specific findings are necessary to enable meaningful appellate review. *Id.*, ¶44. Here, in the circuit court, the County specifically argued that the third standard was met. The circuit court's oral ruling mirrored that standard.

Accordingly, on appeal, T.M.S. focused on the third standard in his Appellant's Brief. In *D.J.W.*, this Court observed that the standard for commitment was "somewhat of a moving target." *Id.*, ¶36. The court of appeals affirmed under the fourth standard. Then, in this Court, the county did not cite any specific subdivision paragraph. Accordingly, "D.J.W. reasonably followed the formulation" of the court of appeals in his brief and opening oral argument. *Id.*, ¶38. But then, in its oral argument, the county "took a new tack and asserted that D.J.W. would be a proper subject for commitment in the event treatment were discontinued not under subd. para. 2.d., but under 2.c." *Id.*, ¶39. This Court stated that, "[t]he record in this case is therefore quite unhelpful in guiding this court's analysis…" *Id.*, ¶40. In T.M.S.'s case, the standard has likewise been a moving target.

Another problem is that the standard court form is confusing and insufficient.[6] The form does not track the language of the statute. As it pertains to dangerousness, the court form contains eight boxes. (*See* 2.B) (App.5). Multiple boxes must be checked in order to establish a given standard. For example, in order to establish the sub. (1)(a)2.a. standard, the court would need to check two separate boxes under 2.B.— both the first and fifth. In turn, the fifth box under 2.B. combines sub. (1)(a)2.a. and b. ("a recent overt act, attempt or threat to act under §51.20(1)(a)2.a. or b., Wis. Stats").

[6] The first page of the court form, which contains the section on dangerousness, is reproduced on the following page.



02-21-2022
Clerk of Circuit Court
Calumet County
2008ME000087

DATE SIGNED: February 21, 2022

Electronically signed by Jeffrey S. Froehlich
Circuit Court Judge

STATE OF WISCONSIN, CIRCUIT COURT, CALUMET COUNTY

IN THE MATTER OF THE CONDITION OF

T[redacted] S[redacted]
Name of Subject

7/22/1965
Date of Birth

☐ Amended

Order of
☐ Commitment
☒ Extension of Commitment
☐ Dismissal

Case No. 08ME87

A hearing was held on [Date] FEBRUARY 21, 2022.

THE COURT FINDS:

☐ 1. Grounds for ☐ commitment ☐ extension of commitment have not been established.

☒ 2. Grounds for ☐ commitment ☒ extension of commitment have been established.

The subject is
A. ☒ mentally ill.
☐ drug dependent.
☐ developmentally disabled.
B. dangerous because the subject evidences one or more of the standards under §51.20(1)(a)2., or under §51.20(1)(a)2. in combination with §51.20(1)(am), ***except for proceedings under §51.20(1)(a)2.e., Wis. Stats.***
☐ a substantial probability of physical harm to himself or herself.
☐ a substantial probability of physical harm to other individuals.
☒ a substantial probability of physical impairment or injury to himself or herself or other individuals due to impaired judgment.
☒ a substantial probability that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness.

As manifested or shown by:
☐ a recent overt act, attempt or threat to act under §51.20(1)(a)2.a. or b., Wis. Stats.
☐ a pattern of recent acts or omissions under §51.20(1)(a)2.c., Wis. Stats.
☐ recent behavior under §51.20(1)(a)2.d., Wis. Stats.
☒ 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.
C. a proper subject for treatment.
D. ☒ a resident of CALUMET County, Wisconsin.
☐ a nonresident of the state of Wisconsin.
☐ an inmate of a Wisconsin state prison.

Furthermore, the form order does not contain all of the substantive statutory elements. For example, in Wis. Stat. 51.20(1)(a)2.c, and 2.d, there is a Chapter 55 exclusion. *See* Wis. Stat. §§ 51.20(1)(a)2.c ("[t]he probability of physical impairment or injury is not substantial under this subd. 2. c. if … the individual may be provided protective placement or protective services under ch. 55"); 51.20(1)(a)2.d. ("[n]o

substantial probability of harm under this subd. 2. d. exists … if the individual may be provided protective placement or protective services under ch. 55…"). This is sometimes referred to as the Chapter 55 exception. *See Dane Cty v. Kelly M.*, 2011 WI App 69, ¶18, 333 Wis. 2d 719 798 N.W.2d 697. Notably, in T.M.S.'s case, there is a guardianship and Chapter 55 protective placement in effect. (R.239:47; App.62).

Finally, T.M.S. questions what the result would be if the court made no oral ruling at all, but checked boxes on the court form. In that instance, all that would remain are magic words, untethered by factual findings or a linkage between those factual findings and the legal standard. If there was a disputed fact, this would leave the individual in the dark as to how the court resolved the dispute.

In sum, given that in its oral ruling the circuit court indicated that the third standard was met, the court of appeals should not have affirmed based on the fourth standard.

D. The evidence is also insufficient under the fourth standard.

Even if it were appropriate to reach the fourth standard, the evidence was also insufficient under that standard. An individual is dangerous under the fourth standard if: "due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical

debilitation, or serious physical disease will imminently ensue . . .” Wis. Stat. § 51.20(1)(a)2.d.

Being delusional, homeless, not speaking “coherently,” eating junk food, and having poor hygiene does not create a substantial probability of death or serious physical harm. Many people with disabilities have difficulty with speech. Many people also have poor diets and hygiene, but unless circumstances are very extreme, this does not cause a substantial probability of imminent death or serious physical harm.

In *Langlade Cty. v. D.J.W.*, 391 Wis. 2d 231, this Court held that the county failed to prove dangerousness under similar facts. D.J.W. had schizophrenia. He did not feel that he needed medication. Instead, he felt like the medication was the problem. *Id.* ¶11. The examining doctor testified that D.J.W. was delusional and that his judgment was impaired. He testified that going off of medication would cause D.J.W. to experience more hallucinations. *Id.* ¶52. The doctor testified that D.J.W. “would not be able to interact appropriately with others” if not under commitment. *Id.* ¶13. He further testified that D.J.W. was not able to care for himself independently and if he did not live with his parents, he would become homeless. *Id.*, ¶11. However, this Court noted that the doctor was unaware of any point at which D.J.W. “had actually been homeless.” *Id.*, ¶14. Under these facts, this Court held that the evidence was insufficient under either the third or fourth standards. *Id.*, ¶¶50, 51.

T.M.S.'s case is akin to *D.J.W.* There was evidence that T.M.S.'s judgment was impaired. There was also concern that he would stop taking medications and experience social difficulties, and would become homeless. However, as in *D.J.W.* there was no evidence of prior homelessness. And T.M.S. had a Chapter 54 guardianship, Chapter 55 protective placement, and financial assets. The County did not prove that these services and resources would not be sufficient.

In sum, there was insufficient evidence to meet the fourth standard under Wis. Stat. § 51.20(1)(a)2.d.

## CONCLUSION

For the reasons stated above, T.M.S. asks this Court is asked to grant his petition for review.

Dated this 10th day of February, 2023.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

P.O. Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

## 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 5,326 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 10th day of February, 2023.

Signed:

COLLEEN MARION
Assistant State Public Defender