WISCONSIN SUPREME COURT

In the Matter of the Guardianship and Protective Placement of M.S.:

WAUKESHA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent, Appeal No. 22-AP-2065

v. Waukesha County 20-GN-197

M.S.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW OF M.S.

ON PETITION FROM THE SEPTEMBER 6, 2023 OPINION OF THE WISCONSIN COURT OF APPEALS, DISTRICT II
Waukesha County Circuit Court Case No. 20-GN-197
Hon. Michael P. Maxwell

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INTRODUCTION

M.S. has paranoid schizophrenia. During the 30 or so years that followed the early 1990s, Waukesha County filed petition after petition to have M.S. involuntarily committed under ch. 51. All were granted, and for good reason. Between 1978 and 1996, he endured 11 inpatient hospitalizations. However, with the benefits of treatment under the ch. 51 commitment, M.S. was able to transition to outpatient care by 1996, availing himself of Waukesha County's Outpatient Community Support Program (CSP). He would remain in the community receiving outpatient care for the next 22 years, at which time he was inexplicably discharged from both the CSP and the commitment.

In 2020, Waukesha County petitioned to have M.S. protectively placed under ch. 55. By that time, M.S. had stopped taking his medications, suffered a mental decompensation, and been involuntarily committed under ch. 51. His condition would finally stabilize and improve several months later—enough to be transferred from an inpatient facility to a group home—after titrating onto olanzapine (Zyprexa), a second-generation antipsychotic medication. At the final hearing on Waukesha County's ch. 55 petition, the evidence demonstrated that treatment continued to help control and improve the symptoms of M.S.'s paranoid schizophrenia and that, if such treatment was withdrawn, M.S. would need a more acute, restrictive level of mental healthcare. Nevertheless, the Circuit Court granted Waukesha County's petition.

This outcome cannot be reconciled with settled law. *Fond du Lac County v. Helen E.F.*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179 (drawing the distinction between the need for rehabilitation to control or improve a treatable disorder for which ch. 51 is more appropriate and the need for habilitation to maximize functioning and maintain

an untreatable disorder for which ch. 55 is more appropriate); *see also State ex rel. Watts v. Combined Community Services Bd.*, 122 Wis. 2d 65, 89-90, 362 N.W.2d 104 (1985) ("Chapter 51, Stats., application requires that a person be rehabilitable. Section 55.06 requires that a person have a permanent condition that requires only 'care and custody,' rather than active treatment.").

M.S. cannot be placed into custodial care under a ch. 55 when the evidence is clear that that he is more appropriately committed for treatment under ch. 51. Because treatment, including the administration of antipsychotic medication, helps control and improve the symptoms of his disorder, and because he withdrawal of such treatment would require that he be placed into a more-restrictive setting, M.S. has a primary need for rehabilitation and is more appropriately treated under ch. 51.

ISSUE FOR REVIEW

Under *Fond du Lac County v. Helen E.F.*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179, does the government fail to carry its burden on a petition to protectively place an individual under ch. 55 if the evidence presented at the final hearing demonstrates that he or she is capable of rehabilitation and is, therefore, more appropriately treated under ch. 51?

METHOD OR MANNER OF RAISING THE ISSUE: M.S. raised this issue during postdisposition proceedings and again on appeal.

M.S.'S POSITION: Yes. He argued that he was capable of rehabilitation within the meaning of *Helen E.F.* and was, therefore, more appropriately treated under ch. 51.

ANSWERED BY THE CIRCUIT COURT: Yes. However, it concluded that M.S. was incapable of rehabilitation within the meaning of *Helen E.F.* and was, therefore, more appropriately treated under ch. 55.

ANSWERED BY THE COURT OF APPEALS: No.

REASONS TO GRANT REVIEW

For the following reasons, the Court should revisit *Helen E.F.*, a largely neglected hallmark of Wisconsin's civil commitment jurisprudence:

First, *Helen E.F.*—if rigorously applied—protects the right to due process of individuals subject to a petition under ch. 51 or ch. 55. It guarantees that they will be committed under whichever chapter affords them the least-restrictive setting appropriate to their needs for the shortest necessary duration. It does this by distinguishing rehabilitation from habilitation. *Helen E.F.* held that an individual whose primary need is *rehabilitation* is more appropriately committed under ch. 51, while an individual whose primary need is *habilitation* should be placed or provided services under ch. 55.

Chs. 51 and 55 pursue different goals. Ch. 51 is designed for the rehabilitation of treatable disorders whereas ch. 55 is designed for the long-term management of untreatable disorders. *Helen E.F.*, 340 Wis. 2d 500, ¶ 25. Indeed, the Court's rehabilitation-habilitation standard arose from the contrast in purposes between the two chapters as well as relevant case law. *Id.* ¶¶ 29-36.

The rehabilitation-habilitation standard turns on whether the individual is "capable of rehabilitation," also termed "rehabilitative potential." An individual is more appropriately treated under ch. 51 if he or she is capable of rehabilitation, *id.* ¶ 29-36, meaning treatment helps in "controlling or improving" their disorder, *id.* ¶¶ 35-36. Conversely, an individual is more appropriately treated under ch. 55 if he or she is incapable of rehabilitation, meaning treatment "maximize[es] their individual functioning and maintenance" but does not help in "controlling or improving" their disorder. *Id.*

Second, M.S. should not be committed indefinitely to a protective placement under ch. 55. Antipsychotic medications and other mental health treatments control and profoundly improve his paranoia and other psychotic symptoms of his illness. In fact, if treatment was withdrawn, he would have to be placed in a locked, inpatient facility. Yet, in 2020, his treatment was so successful that he was transferred under ch. 51 to a group home, where he enjoyed far fewer restraints on his liberty. Clearly, he has rehabilitative potential.

Finally, *Helen E.F.*'s rehabilitation-habilitation standard is overlooked, imperfect, and indispensable. Moreover, it is no dead letter. The Court of Appeals refused to acknowledge its existence, essentially treating *Helen E.F.* as an advisory opinion and its rehabilitation-habilitation standard as dicta. The Court should grant this petition to reverse the trajectory of this vital precedent.

STATEMENT OF THE CASE

A. Nature of the Case

From 1978 to the early 1990s, M.S. was frequently admitted to psychiatric hospitals for inpatient treatment of paranoid schizophrenia. Then, in the early 1990s, Waukesha County involuntarily committed him under a ch. 51. He remained under that commitment for nearly all of the next 30 years, most which he spent receiving outpatient care in the community. Waukesha County let his ch. 51 commitment expire on August 9, 2021. Nine months prior, on November 6, 2020, Waukesha County petitioned to have permanent guardians appointed for M.S. and his estate due to incompetency. Following a one-day contested hearing on January 12, 2021, the Circuit Court granted the guardianship petitions.[1] On June 7, 2021, Waukesha County petitioned for a protective placement under ch. 55. Following a one-day contested hearing on August 31, 2021, the Circuit Court granted the protective placement petition.

B. Procedural Status and Disposition in Lower Courts

M.S. filed a motion for postdisposition relief, arguing that he was not an appropriate subject for treatment under a ch. 55 protective placement, citing *Helen E.F.* The Circuit Court denied the motion in a written decision. (P-App 019-24.) In analyzing whether M.S. was more properly treated under chs. 51 or 55, the Circuit Court found that, under *Helen E.F.*, M.S. did not have rehabilitative potential. (P-App 020-024.) It, instead, concluded that he belonged in long-term custodial care because his treatment did not improve his condition enough to allow him to fully reintegrate into society. (Id.)

[1] M.S. does not dispute the order granting the petition to appoint permanent guardians over him and his estate.

On September 6, 2023, the Court of Appeals affirmed, albeit on different grounds. (P-App 001-0018.) It chided M.S. for arguing that he would be more appropriately treated under ch. 51, calling it a "red herring": "Unfortunately, [M.S.] gets off track early in this appeal, spending his entire appellate briefing effort attempting to convince us that his circumstance would be more appropriately considered under WIS. STAT. ch. 51 instead of WIS. STAT. ch. 55." (P-App 003-004, n.3.) Dismissing *Helen E.F.*, it stated that, "[w]hile that case is informative as to various matters related to WIS. STAT. chs. 51 and 55, at the end of the day, the *Helen E.F.* court's decision was that Helen was 'improperly committed under ch. 51' because she was not 'a proper subject for treatment [under that chapter] because . . . she [was] not medically capable of rehabilitation, as required by' ch. 51." (Id. (citing 340 Wis. 2d 500, ¶ 42).) It insisted: "[W]hether the ch. 51 approach might be a 'more appropriate' action[] is not before us and not a matter for us to dwell on. Which path to pursue—ch. 55 or ch. 51—is an executive decision made by the County, not the courts." (Id.)

The Court of Appeals, instead, performed a rote application of the statutory elements to the facts of the case, concluding that the evidence sufficed to affirm the Circuit Court's ruling.

M.S. moved for reconsideration. He argued in relevant part:

> There is no disputing the Court's observation that, "at the end of the day, the *Helen E.F.* court's decision was that Helen was 'improperly committed under ch. 51' because she was not 'a proper subject for treatment [under that chapter] because . . . she [was] not medically capable of rehabilitation, as required by' ch. 51." (Op. at 4, ¶ 6 n.3.) But at the same time, there is also no disputing that *Helen E.F.* analyzed <u>two issues</u>: "whether Helen is a proper subject for treatment under Wis. Stat. ch. 51, <u>and whether ch. 55 or 51 is a more appropriate avenue for Helen's care.</u>" 340 Wis. 2d 500, ¶ 31 (emphasis added).

> At the beginning of the *Helen E.F.* opinion, the Supreme Court made its holding apparent: "After reviewing chs. 51 and 55, we hold that Helen is more appropriately treated under the provisions provided in ch. 55 rather than those in ch. 51." *Id.* ¶ 2. In this appeal, [M.S.] asked the Court to hold that he is more appropriately treated under the provisions provided in ch. 51 rather than those in ch. 55.

(Resp.'s Mot. for Recons., at 2-3 (footnote omitted, emphases in original).)

The Court of Appeals denied the motion, without comment. This petition follows.

C. Statement of Facts Undisputed

The Court of Appeals fully and fairly summarized the pertinent background facts in its opinion.

ARGUMENT

I. THE COURT SHOULD REVISIT *HELEN E.F.* TO CLARIFY ITS CRUCIAL ROLE IN SAFGUARDING AGAINST THE GOVERNMENT'S UNJUSTIIFED AND IMPROPER CHOICE BETWEEN SEEKING TREATMENT UNDER CH. 51 AND CUSTODIAL CARE UNDER CH. 55.

Helen E.F. is in important cause for any respondent who faces either a petition to commit him to treatment under ch. 51 or a petition to place him into custodial care under ch. 55 but whose history makes a plausible case for a commitment either one. Under these circumstances, the Court indicated in *Helen E.F.* that one of the two chapters may be more appropriate and that, if so, the government cannot meet its burden to prove the other, lesser-appropriate option.

The Court should grant this petition to resuscitate the importance of *Helen E.F.* and to more directly describe its connection to key principles of due process.

A. *Helen E.F.* Adopted the Rehabilitation-Habilitation Standard for Determining Whether an Individual is More Appropriately Treated Under Ch. 51 or Ch. 55.

1. *The Court's holding*

In *Helen E.F.*, the Court was asked to address the converse question that this petition raises. It was asked to determine whether the government properly committed under ch. 51 as opposed to ch. 55 given that she suffered from Alzheimer's Disease. 340 Wis. 2d 500, ¶ 2. It concluded that she may not: "After reviewing chs. 51 and 55, we hold that Helen is more appropriately treated under the provisions provided in ch. 55 rather than those in ch. 51." *Id.*

2. *The purposes and requirements of ch. 51 and ch. 55*

Chs. 51 and 55 "serve substantially different purposes." *Id.* ¶ 21. "[C]h. 55 was specifically tailored by the legislature to provide for long-term care of individuals with incurable disorders, while ch. 51 was designed to facilitate the treatment of mental illnesses suffered by those capable of rehabilitation." *Id.* ¶ 13; *see also id.* ¶ 21 ("[Ch.] 51 is designed to accommodate short-term commitment and treatment of mentally ill individuals, while ch. 55 provides for long-term care for individuals with disabilities that are permanent or likely to be permanent." (citing Wis. Stat. §§ 51.20(1)(a), 51.20(13)(g), 55.08(1)(d)).

Importantly, "ch. 51, . . . unlike ch. 55, has the principal purpose of 'assur[ing] *the provision of a full range of treatment and rehabilitation services . . . for all mental disorders and . . . for mental illness . . . .*'" *Id.* ¶ 20 (quoting § 51.001(1)) (emphasis added).

To be eligible for a ch. 55 protective placement, the government must prove that the respondent

> 3. has "a primary need for residential care and custody";
>
> 2. is "an adult who has been determined to be incompetent by a circuit court";
>
> 3. is "so totally incapable of providing for his . . . own care or custody as to create a substantial risk of serious harm to himself" because of "a developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacit[y]"; and
>
> 4. has "a disability that is permanent or likely to be permanent."

Wis. Stat. § 55.08(1).

At a hearing on a ch. 55 petition, the government petitioner must prove these elements by clear and convincing evidence, consisting of testimony of witnesses assigned to conduct an analysis of the respondent. *Id.* ¶ 17. If granted, the Circuit Court "may order a protective placement . . . at a 'nursing home[], public medical institution[,] . . . or [at] [an]other appropriate facilit[y],' *but may not order placement at 'units for the acutely mentally ill.'*" *Id.* (quoting Wis. Stat. § 55.12(2)) (emphasis added). It may grant the facility permission to administer psychotropic medications. *Id.* ¶ 18.

To be eligible for a ch. 51 involuntary commitment, the government must prove by clear and convincing evidence that the respondent

1. is "mentally ill";
2. is "a proper subject for treatment"; and
3. is "dangerous" to themselves or to others.

Id. at ¶ 20 (quoting § 51.20(1)(a)). Otherwise, "the procedures for commitment in ch. 51 are similar to those contained in ch. 55." *Id.*

The Court held that "ch. 55 provides Helen with the best means of care . . . because ch. 55 was specifically tailored by the legislature to provide for long-term care of individuals with incurable disorders, while ch. 51 was designed to facilitate the treatment of mental illnesses suffered by those capable of rehabilitation." *Id.* ¶ 13. It found that, "[b]ecause Helen's disability is likely to be permanent, she is a proper subject for protective placement and services under ch. 55, which allows for her care in a facility more narrowly tailored to her needs, and which provides her necessary additional process and protections." *Id.* ¶ 2. It further found "that Helen is not a proper

subject for treatment because while her Alzheimer's Disease may be managed, she is not medically capable of rehabilitation, as required by the chapter." *Id.*

3. *Procedural protections*

In choosing whether it is more appropriate to petition under ch. 51 or ch. 55, the government must consider the respondent's right to "be attended to with the fewest possible constraints on her freedom consistent with her own protection and the safety of the public." *Id.* ¶ 22 (citing Wis. Stat. §§ 55.001 (requiring placement with "the least possible restriction on personal liberty"), 51.001 (stating that it is the purpose of the chapter to provide "the least restrictive treatment alternative appropriate to [the respondent's] needs")). The Circuit Court's decision requires it to balance these interests. *Id.* (citing *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (emphasizing "the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints")).

Whichever chapter best comports with the respondent's interests will depend on his or her circumstances. For example, the Court explained that "an individual committed under ch. 51 may be placed in <u>any</u> mental health unit without an additional finding by the circuit court, while under ch. 55, an individual may not be placed in units for the acutely mentally ill." *Id.* ¶ 23 (emphasis in original).

The Court found this distinction vital to the propriety of placing her under ch. 55

> because under the language of ch. 51, Helen, an 85 year-old Alzheimer's Disease patient, could be committed to a facility that tends to acutely mentally ill patients. See § 51.01(19) ("'Treatment facility' means any publicly or privately operated facility or unit thereof providing

> treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons . . . ."). Thus, ch. 55 excludes certain facilities that Helen might otherwise be placed in pursuant to ch. 51. Because it is more narrowly tailored to her specific condition, and because it affords her additional process designed to ensure the appropriateness of her facility, we conclude that ch. 55 better balances Helen's interest in liberty with the County's interest in protecting the public and in affording her the care she requires.

Id. ¶ 23.

4. *Rehabilitation-habilitation standard*

The Court's rehabilitation-habilitation test was first adopted in *Helen E.F.* and then supplemented in *Waukesha County v. J.W.J.*, 2017 WI 57, 375 Wis. 2d 542, 895 N.W.2d 783. In *Helen E.F.*, the Court's "analysis of whether [an individual] is a proper subject for treatment under Wis. Stat. ch. 51, *and whether ch. 55 or 51 is a more appropriate avenue for [his or her] care*[,]" depended on whether the individual was "capable of 'rehabilitation.'" 340 Wis. 2d 500, ¶¶ 30-31 (citing Wis. Stat. § 51.01(17)). For whether an individual was capable or incapable of rehabilitation, the Court turned to case law. *Id.* ¶ 31 (citing *Milwaukee Cnty. Combined Cmty. Servs. Bd. v. Athans*, 107 Wis. 2d 331, 337, 320 N.W.2d. 30 (Ct. App. 1982) (found subject *incapable* of rehabilitation); *C.J. v. State*, 120 Wis. 2d 355, 354 N.W.2d 219 (Ct. App. 1984) (found subject *capable* of rehabilitation)).

In *Athans*, the Court of Appeals found that "Athans, a chronic paranoid schizophrenic, 'was not a proper subject for treatment because rehabilitation in her case was not possible.'" *Id.* ¶ 32 (quoting 107 Wis. 2d at 333). The examining expert explained that her care could achieve no more than "long-term stabilization, or management of the disease." *Id.* ¶ 32. Any "attempted treatment of [Athan's] underlying condition . . . would 'have as much effect on her as water

on a duck's back.'" *Id.* The Court of Appeals concluded that she "could not be rehabilitated, because it understood from the testimony of [the expert] that Athans 'would not change her delusional scheme no matter what the treatment attempted, including sedation.'" *Id.* ¶ 33 (quoting 107 Wis. 2d at 333).

In *C.J.*, the Court of Appeals concluded that C.J., another chronic paranoid schizophrenic, *was* capable of rehabilitation because "treatment could help C.J. . . . by effecting a change in his underlying disorder." *Id.* ¶ 34 (citing 120 Wis. 2d at 356, 362). It distinguished *Athans* because the evidence showed "that [Athans's] delusional scheme would not change no matter what treatment was tried" and that her "disorder[] could not be helped in any way." *Id.* ¶ 35 (citing 120 Wis. 2d at 361). While the provision of care might have "helped her in terms of maximizing [her] individual functioning and maintenance," it would not have "helped in controlling or improving [her] disorder[.]" *Id.* (citing 120 Wis. 2d at 362). The Court of Appeals found, by contrast, that "C.J. will benefit from treatment that will go beyond controlling his activity" and will, instead, further help in "controlling his disorder and its symptoms." *Id.*

Consequently, based on *Athans* and *C.J.*, the Court held that an individual is *incapable* of rehabilitation "[i]f treatment will 'maximize[e] the[] individual functioning and maintenance' of the [patient], but not 'help[] in controlling or improving [his] disorder[.]'" *Id.* ¶ 36 (quoting *C.J.*, 120 Wis. 2d at 362). Accordingly, a patient is properly a subject of ch. 51—and not ch. 55—if treatment helps control or improve the symptoms of his disorder.

Helen had Alzheimer's disease. The Court found "that while the medical techniques employed in Helen's case 'maximiz[e] [her] . . . functioning and maintenance,' . . . those techniques are unfortunately unlikely to rehabilitate her." *Id.* ¶ 37. "[G]iven the

current state of medical science, Helen's Alzheimer's Disease is incurable and untreatable; the only available medical remedy is maintenance—not treatment—of the disease as it progresses." *Id.* Consequently, "[b]ecause Helen's Alzheimer's Disease is not treatable and medical techniques can only 'maximiz[e] the[] . . . functioning and maintenance' of an individual, . . . we conclude that Helen cannot be rehabilitated within the meaning of Wis. Stat. ch. 51." *Id.*

The Court would further discuss *Helen E.F.* in its 2017 case, *Waukesha County v. J.W.J.*, involving another paranoid schizophrenic. In affirming *Helen E.F.*'s reliance on "rehabilitative potential," the Court described the distinction between "rehabilitation" and "habilitation" as originally drawn by the Court of Appeals in *C.J. v. State*. About habilitation, it wrote:

> [HJabilitation is more closely related to daily living needs and skills than to treatment of a particular disorder. A practical definition of habilitation would include eating, dressing, hygiene, minimum social skills and such other things that facilitate personal maintenance and functioning. Habilitation is a concept frequently associated with the long-term care of the developmentally disabled. It is possible that controlling a person's activities by restricting his or her freedom and putting him or her on a carefully defined regimen would be part of a habilitation program.

375 Wis. 2d 542, ¶ 31 (quoting *C.J.*, 120 Wis. 2d at 359-60).

"Rehabilitation," on the other hand, "addresses the control of symptoms" and "comprises 'treatment going beyond custodial care to affect the disease and symptoms.'" *Id.* ¶ 32 (quoting *C.J.*, 120 Wis. 2d at 360). The Court took care to note that "rehabilitation is not synonymous with cure." *Id.* Its meaning is broader "than returning an individual to a previous level of function." *Id.* Accordingly, the Court held that "[a]n individual with an incurable physical or mental illness or disability may still be considered capable of rehabilitation

and able to benefit from treatment in the sense that symptoms can be controlled and the ability to manage the illness ameliorated." *Id.*

The Court demonstrated this dichotomy by contrasting C.J.'s symptoms—who, like J.W.J., suffered from paranoid schizophrenia—from Helen's symptoms—who suffered from Alzheimer's disease. *Id.* ¶ 33. The primary symptoms of C.J.'s paranoid schizophrenia were "recurrent delusions," which "impair[ed] his judgment and behaviors." *Id.* (quoting *C.J.*, 120 Wis. 2d at 357). The primary symptoms of Helen's Alzheimer's disease were "progressive dementia, memory loss, the inability to learn new information, and limited verbal communication," which caused "agitation and aggression." *Id.* (quoting *Helen E.F.*, 340 Wis. 2d 500, ¶ 3). As explained in *Helen E.F.*, "Helen's treatment could not reach her primary symptoms" and "could 'maximize [only] her functioning and maintenance.'" *Id.* ¶ 34 (quoting *Helen E.F.*, 340 Wis. 2d 500, ¶ 37).

The *J.W.J.* Court also added another key component to the concept of rehabilitative potential. It reasoned that a patient has "rehabilitative potential" "[i]f a treatment controls symptoms to such a degree that withdrawing it would subject the patient to a more restrictive treatment alternative." *Id.* ¶ 41.

Ultimately, the Court held that "[t]he uncontroverted facts show that [J.W.J.] has rehabilitative potential" and was more appropriately treated under ch. 51. *Id.* ¶ 40. While "his paranoid schizophrenia was a 'substantial disorder of his thought, mood, and perception' that 'grossly impair[s] his judgment and behavior,' . . . [t]he treatment he receives lessens the disordering of his thought, mood, and perception." *Id.* The Court acknowledged that, "while some of [J.W.J.'s] experiences and symptoms may still be present while under treatment, he does not act on them" and that "his

treatment is so effective at controlling his symptoms that he can live in society while taking his treatment as an outpatient." *Id.*

Moreover, "without treatment, [J.W.J.'s] condition would inevitably decline to the point he would have to be confined so he could receive inpatient treatment." *Id.* Indeed, he must have "rehabilitative potential" because, "[i]f treatment is withdrawn, [his] symptoms will worsen to the point that a more restrictive level of care would be necessary (confinement for inpatient treatment); reintroduction of treatment would return him to the previous level (treatment as an outpatient)." *Id.* ¶ 41. The Court noted that "[i]t is enough that treatment can accomplish this to demonstrate the patient has rehabilitative potential." *Id.*

B. The Court Should Endorse a Standard for Determining Whether Individuals Are More Appropriately Treated Under Ch. 51 or Ch. 55 Because Their Due Process Rights Entitle Them to the Shortest, Least-Restrictive Placement Necessary to Address Their Condition.

A commitment in any form exacts "a massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980). *Helen E.F.* is important because it protects the individual from an unnecessarily prolonged and inappropriately restrictive commitment. More than 50 years ago, the U.S. Supreme Court first recognized that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Three years later, it first described the principle that institutionalization must be in the least-restrictive setting appropriate to the patient's needs. *See O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

"Both ch. 51, civil commitment, and ch. 55, protective placement . . . require treatment in the least restrictive alternative" to

meet the individual's needs. *Watts*, 122 Wis. 2d at 72-73; *see also* Wis. Stat. §§ 51.001(1) ("There shall be a unified system of prevention of such conditions and provision of services which will assure all people in need of care access to the least restrictive treatment alternative appropriate to their needs . . . ."), 51.20(13)(c)2. ("If disposition is made [to commit the individual to the county's inpatient or, if inpatient not ordered, outpatient care,]" then "[t]he county . . . shall arrange for treatment in the least restrictive manner consistent with the requirements of the [] individual . . . ."), 51.61(1)(e) (Patient rights under chs. 51 and 55 include the "right to the least restrictive conditions necessary to achieve the purposes of admission, commitment or protective placement . . . ."), 55.12(3) ("Protective placement . . . provided by a county . . . shall be provided in the least restrictive environment and in the least restrictive manner consistent with the needs of the individual to be protected . . . .").

The Court should grant review because, if the rejection of *Helen E.F.* and the Court's rehabilitation-habilitation test by the opinion below is any indication, the Court of Appeals does not appreciate the significant procedural protection at stake. The lack of any case law applying it—*J.W.J.* aside—supports this hypothesis.

This raises two further concerns. First, there are likely individuals placed under ch. 55 who could have made the case for a lesser-restrictive form of treatment—specifically, one that is time-limited instead of indefinite. As *Watts* pointed out, "there are fundamental differences in the procedure employed in ch. 51 and ch. 55[]. Patients committed under sec. 51.20 have time-limited commitments—six months for the first commitment and one year for subsequent ones—which must be renewed through a full due process court proceeding initiated by the party wishing to continue the commitment." 122 Wis. 2d at 74-75. While *Watts* remedied the absence of periodic reviews in ch. 55 placements, its observation

remains true that "[p]rotective placements . . . are the only involuntary commitments under Wisconsin law that are indefinite in duration and thereby are tantamount to a life sentence to a nursing home or other custodial setting." *Id.* at 76-77.

Second, the least restrictive treatment rule actually has two parts. The lesser-known of the two is that the individual must receive the least restrictive treatment alternative *appropriate to his or her needs*. That italicized portion is essential to whether ch. 51 or ch. 55 is more appropriate. As *Helen E.F.* emphasized, "ch. 51, . . . unlike ch. 55, has the principal purpose of 'assur[ing] the provision of a full range of treatment and rehabilitation services . . . for all mental disorders and . . . for mental illness . . . .'" 340 Wis. 2d 500, ¶ 20 (quoting Wis. Stat. § 51.001(1)). But under ch. 55, the courts "may order a protective placement . . . at a 'nursing home[], public medical institution[,] . . . or [at] [an]other appropriate facilit[y],' but may not order placement at 'units for the acutely mentally ill.'" *Id.* (quoting § 55.12(2)). Thus, there are likely individuals placed under ch. 55 who, by statute, do not have access to the treatment tailored to meet their treatment needs.

The Court should grant this petition to address these concerns.

II. UNDER *HELEN E.F.*, WAUKESHA COUNTY'S PETITION TO PROTECTIVELY PLACE M.S. UNDER CH. 55 MUST FAIL BECAUSE THE EVIDENCE CLEARLY SHOWED THAT HE HAD REHABILITATIVE POTENTIAL AND WAS, THEREFORE, MORE APPROPRIATELY TREATED UNDER CH. 51.

The Court should also review this case for M.S.'s sake. As it currently stands, he will most likely live the remainder of his life in custodial care. Every six to twelve months, if Waukesha County wished to extend his commitment, then it would have to meet the

same exacting burden that it did for his initial commitment, i.e., to prove by clear and convincing evidence—after that a full reexamination of M.S.'s mental condition—that he is, at present, both mentally ill and dangerous.

These things are important to M.S. because it gives him hope that, one day, he will be able to return home. *See O'Connor*, 422 U.S. at 575 ("[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.").

Waukesha County will be quick to insist that M.S. will never return home or improve to a point where he can live independently within the community. Perhaps. However, that is not the standard. Whether he should continue to be afforded that chance is governed by *Helen E.F.*'s rehabilitation-habilitation standard.

The evidence presented at the final hearing showed to an utmost certainty that he had rehabilitative potential within the meaning of *Helen E.F.* Indeed, he had thrived under his then-recent ch. 51 involuntary commitment. Between ch. 51 and ch. 55, M.S. far more appropriately deserves mental health treatment under ch. 51, a time-limited, lesser restrictive, and more closely tailored to his needs—especially compared to custodial care under ch. 55.

For decades, Waukesha County had him committed under ch. 51. Its decision to do so was sensible because M.S. had rehabilitative potential, making him a proper subject for a ch. 51 commitment. Today, M.S. still has rehabilitative potential because, according to the evidence, treatment continues to help control and improve the symptoms of his paranoid schizophrenia. The evidence further shows that M.S.'s treatment helps control and improve those symptoms to such a degree that withdrawing it would subject him to a more restrictive treatment alternative, namely inpatient care in a

locked facility. Consequently, M.S. is not a proper subject for a Chapter 55 protective placement.

Like for J.W.J.'s and C.J.'s paranoid schizophrenia, psychotropic medications helped control and improve the primary symptoms of M.S.'s paranoid schizophrenia. It is undisputed that M.S. began 2020 at TCHCC, a locked inpatient facility. Despite trying antipsychotic medications that, in the past, had yielded psychiatric stability, M.S. was simply not responding to the treatments. Then in February 2020, his providers introduced a new antipsychotic medication, Zyprexa. This, according to the evidence, substantially improved the symptoms of M.S.'s paranoid schizophrenia, leaving no doubt that he, like J.W.J. and C.J., possessed "rehabilitative potential" within the meaning of *Helen E.F.*

The record of the final hearing is replete with evidence establishing M.S.'s rehabilitative potential. It falls into one of two categories: (1) evidence that the treatment helps control or improve the symptoms of M.S.'s paranoid schizophrenia, and (2) evidence that, if the treatment was withdrawn, the symptoms of M.S.'s paranoid schizophrenia would worsen to the point that a more restrictive level of care would be necessary.

A. Evidence that the Treatment Helps Control or Improve the Symptoms of M.S.'s Paranoid Schizophrenia.

The record of the August 31, 2021 hearing establishes M.S.'s rehabilitative potential. Dr. Peder Piering, the examining psychologist appointed by the Circuit Court, explained in his report that, "until given oral Zyprexa," "M.S. was considered treatment resistant." However, when Zyprexa was commenced in February 2020, he "began to respond." According to Dr. Piering, M.S. continued to improve and, since his admission to Cedar Ridge AFH, "ha[d] been compliant with and benefitted [from] medication

management." Dr. Piering opined that, overall, "[M.S.] has benefitted from [medications] and has been psychiatrically more stable with absence of violent/aggressive behavior[.]"

Jessica Eckert, M.S.'s case manager and social worker with Waukesha County, concurred with this assessment in her memorandum to the Circuit Court. She stated that, "[a]s a result of [M.S.] taking his psychotropic medications as prescribed, his mental health status has improved considerably as evidenced by a significant decrease in violent/aggressive behavior and an improvement in his paranoid and delusional thought process."

Rachel Leonhard, a senior mental health counsellor and M.S.'s case manager, concurred: "[Zyprexa] made a significant difference in [M.S.'s] overall psychiatric status as well as his functional status." As his case manager, she observed that, after being treated with Zyprexa, M.S. became "less paranoid"; his thoughts became "more clear, organized and logical"; his behaviors were "no longer . . . dangerous, aggressive or violent"; and he engaged in "self care and hygiene practices." Within just a matter of months of taking Zyprexa, "[M.S.] had demonstrated significant improvement to the extent that the in-patient team recommended conditional transfer to a group-home setting in the community."

Similarly, Ms. Leonhard's March 4, 2021 report—generated at Waukesha County's behest in M.S.'s ch. 51 proceeding—explicitly stated that Zyprexa helped improve and manage the symptoms of M.S.'s disorder:

> [O]nce oral Zyprexa was added in February 2020, **[M.S.] experienced significant improvement in symptom management** by May 2020. [M.S.] initially refused the oral Zyprexa at times (resulting in administration of short-acting IM injection as an alternative to each dose. It is worth noting that this short-acting injectable is not available for use

> outside of the inpatient setting); As his mental health status improved, [M.S.] eventually cooperated with administration of the oral tablet.

(Emphasis added.) Her report concluded that "[M.S.'s] mental health status ha[d] improved considerably":

> In sum, since taking all recommended medications as prescribed and residing in a residential setting (under the Ch 51 conditional transfer), [M.S.'s] mental health status has improved considerably, as evidenced by an absence of violent/aggressive behavior, his ability to engage basic and instrumental ADLs with appropriateness, and his continued follow through on taking his oral medications as prescribed (with group home support), from this, [M.S.] has been able to reside safely in the community.

M.S. continued to benefit from treatment at Cedar Ridge AFH. Ms. Leonhard testified that she visited him there just a few months before the hearing. She described him as "pleasant," cooperative," "clear and organized" in thought, "engaged," and not making "any paranoid or unusual statements." She explained that "[h]e cooks, he bakes, he gardens. I understand he's gone fishing on one or more occasions and goes on outings with his peers and the staff at the group home." Acknowledging his enduring improvement, Ms. Leonhard testified "that [M.S.'s] symptoms status has remained consistent since he's been in [Cedar Ridge AFH]."

This evidence establishes M.S.'s rehabilitative potential beyond any doubt.

B. Evidence that, If the Treatment Was Withdrawn, the Symptoms of M.S.'s Paranoid Schizophrenia Would Worsen to the Point that a More Restrictive Level of Care Would be Necessary.

Other evidence in the record also shows that M.S. has rehabilitative potential. As noted above, the Court held in *J.W.J.* that a patient has "rehabilitative potential" "[i]f a treatment controls

symptoms to such a degree that withdrawing it would subject the patient to a more restrictive treatment alternative." 375 Wis. 2d 542, ¶ 41. J.W.J. had "rehabilitative potential" because, "[i]f treatment is withdrawn, [his] symptoms will worsen to the point that a more restrictive level of care would be necessary (confinement for inpatient treatment); reintroduction of treatment would return him to the previous level (treatment as an outpatient)." *Id.*

The same is true of M.S. In making its case for a ch. 55 protective placement, Waukesha County relied heavily on evidence that M.S. resists taking medications, that he has limited insight into his illness, and that, if left untreated, he will decompensate, return to an uninhabitable home, and potentially harm himself or others. However, this evidence undermined Waukesha County's petition. While under the ch. 51 commitment and medication order, M.S. *was* taking his medications and, due to their benefits, had been successfully transferred from a locked, inpatient facility (TCHCC) to an outpatient group home (Cedar Ridge).

For example, Dr. Piering testified that—while under the existing ch. 51 commitment and involuntary medication order—M.S. took his medication: "To my understanding, he has generally been compliant during the commitment periods. He has not demonstrated insight into his mental illness or his need for medications, but he did take them." Likewise, Ms. Eckert's memorandum stated that, despite initial misgivings, "[M.S.] does take his medications as prescribed." Ms. Leonhard agreed: "He has not refused to take it while at the Cedar Ridge Group Home."

Dr. Piering indicated that it was only "[w]hen [M.S.] was taken off commitment back in 1994 and again in 2019" that "he goes off his medications . . . and deteriorates." He opined that, if M.S. failed to "follow through with medications, [he] believe[d] that [M.S.] would

become further paranoid, become more resistant to treatments, not be able to meet his everyday needs." He further indicated that, "[i]f [M.S.] does not follow through with his meds, he has a history of violent behavior. He has a history of suicidal ideation."

Clearly, M.S.'s medications, including Zyprexa, were preventing this downfall from occurring. They helped control and improve his symptoms to such a degree that, instead of having to be inpatient at a more restrictive, locked facility like WMHI or TCHCC, his providers agreed to transfer him to Cedar Ridge AFH, an unlocked, lesser-restrictive facility providing outpatient care.

For instance, Ms. Eckert's memorandum stated that, by April 2020, M.S.'s treaters at TCHCC "determined that [M.S.] was ready for discharge and appropriate for a community-based residential placement where he would continue to receive 24/7 supervision, medication administration, and symptom management/treatment support." Waukesha County evidently agreed because, as part of its ch. 51 commitment, M.S. was conditionally transferred from TCHCC to the Cedar Ridge AFH, an adult family home, in September 2000, where he could continue treatment in a supervised, outpatient setting.

Similarly, Ms. Leonhard testified that, when first assigned M.S.'s case, he had gone off his medications for eight months and was, as a result, receiving inpatient care and involuntary treatment at WMHI and, later, TCHCC, a locked facility. Although M.S. did not respond to initial treatment, he was eventually given Zyprexa which, as described above, triggered a cascade of improvements. It was this treatment that led directly to M.S.'s transfer to a lesser-restrictive alternative:

> Q And at some point as this Zyprexa improved his functioning, did you or his case managers at the

> Trempealeau County Facility consider moving him to a less restrictive type of treatment?
>
> A Yes. So he was started on the Zyprexa in February, and by May, he had demonstrated significant improvement to the extent that the in-patient team recommended conditional transfer to a group-home setting in the community.
>
> Q And just to be clear, at that point he was still under a Chapter 51 commitment, so when you use the term conditional transfer, that's a term under a Chapter 51 commitment?
>
> A Correct.
>
> Q And where was that conditional transfer to?
>
> A Cedar Ridge Adult Family Home in Arcadia, Wisconsin.
>
> Q And is that where he currently is residing?
>
> A Correct.
>
> Q And that's an adult family group home?
>
> A Correct.

This evidence confirms M.S.'s rehabilitative potential. His treatment, including Zyprexa, "controls [his] symptoms to such a degree that withdrawing it" would cause him to decompensate, deteriorate, and necessitate "a more restrictive treatment alternative" than Cedar Ridge AFH—such as the locked, inpatient facilities at WMHI or TCHCC. *See J.W.J.*, 375 Wis. 2d 542, ¶ 41. As such, ch. 51—and not ch. 55—was the proper avenue for addressing M.S.'s needs.

CONCLUSION

For the foregoing reasons, M.S. respectfully requests that the Court grant this petition.

Dated this 30th day of October, 2023.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. RULE 809.19(8g)(a)

I hereby certify that this petition for review meets the form and length requirements of Wis. Stat. Rules 809.19(8)(b), (bm), and (c), and 809.62(4), as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this petition for review is **6,792 words**.

Dated this 30th day of October, 2023.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. RULE 809.19(8g)(b)

I hereby certify that separately filed with this petition for review is an appendix that complies with Wis. Stat. Rules 809.19(2)(a) and 809.62(2)(f) and (4), and that contains:

(1) A table of contents;

(2) The decision and opinion of the court of appeals;

(3) The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;

(4) Any other portions of the record necessary for an understanding of the petition; and

(5) A copy of any unpublished opinion cited under Rule 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 30th day of October, 2023.

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