STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP002095

In the matter of the mental commitment of W.I.:
WINNEBAGO COUNTY,

Plaintiff-Respondent,

v.

W.I.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

Prior to a final mental commitment hearing, the court must appoint two experts to examine the individual and produce reports regarding that individual's mental illness and dangerousness. Wis. Stat. § 51.20(9)(a)1. But, "the individual has a right at his or her own expense or, if indigent and with approval of the court hearing the petition, at the reasonable expense of the individual's county of legal residence" to an additional expert examination and to present that expert's testimony at the final hearing. Wis. Stat. § 51.20(9)(a)3.

This Court should grant review to address two novel questions of statutory interpretation:

1. What must the circuit court "approve" when an indigent individual exercises his or her "right" to an additional examination under Wis. Stat. § 51.20(9)(a)3.? Must the court approve the request for the examination itself? Or the amount of the expense, identity of the expert, the individual's indigency status, or some other issue?

2. Does Wis. Stat. § 51.20(9)(a)3. impose the burden of establishing indigency on the individual? If so, what is the criteria for deciding indigency and must those criteria be established prior to the appointment of the expert?

CRITERIA FOR REVIEW

This Court should grant review to determine that indigent individuals facing involuntary mental health commitment and medication orders have a statutory right to an additional examination at the county's expense upon request pursuant to Wis. Stat. § 51.20(9)(a)3., and this Court should decide whether they must first prove good cause, indigency, or meet another standard.

Wis. Stat. § 51.20(9)(a)3. states,

> "If requested…the individual has a right at his or her own expense or, if indigent and with approval of the court hearing the petition, at the reasonable expense of the individual's county of legal residence, to secure an additional medical or psychological examination and to offer the evaluator's personal testimony as evidence at the hearing."

Interpreting this statute will help develop the law on novel issues that will have statewide impact as it implicates the rights of all Wisconsin residents subject to Chapter 51 proceedings. Wis. Stat. § 809.62(1r)(c).

Until the unpublished, but authored, court of appeals decision in this case, no cases have interpreted this statute. *See Winnebago County v. W.I.*, No. 2022AP2095, unpublished op., (Wis. Ct. App. August 30, 2023); (App. 3-10). Since the case is authored, it can still be cited for persuasive authority.

However, the decision has generated far more questions about the statute than it has resolved.

The court of appeals declined to address the issue on appeal—was W.I., as an indigent individual subject to Chapter 51 proceedings, denied his right to an additional examination and to present that examiner's testimony at the hearing when the circuit court denied his request based on a good cause standard in violation of W.I.'s due process and equal protection rights? *Id.*, ¶10; (App. 8). The court also declined to determine whether W.I.'s appeal was moot, as raised by the County. *Id.*

Instead, the court of appeals held that W.I. failed to "prove" that he was indigent and thus, "the circuit court's decision denying him an additional examination was the correct result." *Id.*, ¶9; (App. 7-8). This holding begs the following questions:

(1) Do indigent individuals have the right to an additional examination at county expense pursuant to § 51.20(9)(a)3., or does a circuit court have the discretion to deny an indigent individual an additional examination based on a good cause standard?

(2) If the statute gives circuit court's the discretion to deny indigent individuals an additional examination based on a good cause standard that their wealthier counterparts need not meet, does the statute violate the individual's right to due process and equal protection under the law?

(3) Does the statute place a burden on the indigent individual to prove he is indigent before his right to an additional examination may attach?

(4) If there is a burden to prove indigency at all, what level of proof must the evidence rise to? Are the trial attorney's assertions that her client had been deemed indigent by the SPD in another matter insufficient? If so, what evidence is sufficient?

(5) What standard of indigency must be proven in order for an individual to be entitled to county funds for an additional examination? Must his indigency rise to the level of the SPD standards despite § 51.60(1)(a) explicitly providing the right to appointment of counsel "without the determination of indigency?" If so, will this require the SPD to make indigency determinations of each client in these difficult cases despite § 51.60(1)(a)?

(6) Does placing the burden to prove ones' own indigency on the indigent individual facing involuntary commitment implicate their right to due process and equal protection given that their wealthier counterparts need not face these same burdens in preparation of their defense in the narrow timelines organized by Chapter 51?

(7) Even if this burden exists and is constitutional, did W.I. have to prove his indigency if the County did not contest the issue and the circuit court accepted the fact?

By reviewing this case, this Court can clarify § 51.20(9)(a)3. and protect indigent individual's rights to an additional examination and to present that examiner as evidence at the hearing from arbitrary circuit court discretion.

STATEMENT OF FACTS

Circuit Court Proceedings

Manitowoc County emergently detained W.I. on April 2, 2022, after staff at Pathways to a Better Life reported that W.I. had made suicidal statements and statements about wanting to harm others. (1)

The day after the proceedings changed venue to Winnebago County, the circuit court, the Honorable Daniel J. Bisset presiding, appointed two examiners to perform evaluations pursuant to § 51.20(9)(a)1. (16). The State Public Defender's Office (SPD) appointed W.I. an attorney the same day. (22). On April 12, 2022, the examining physicians' reports were filed.

At the outset of the first hearing in Winnebago County, W.I. requested a "third independent examiner" per § 51.20(9)(a)3. (51:2). The circuit court denied W.I.'s request. It stated:

> Because it does indicate here if he isn't indigent then it would be at his expense. If he is indigent, which you represent that he is, the statute provides "and with approval of the court hearing the petition" so then it is – then the reasonable

> expense of the individual's county of residence would be utilized. I don't believe there's a need for that independent – you have the right to it – so if there's funding available through the public defender's officer or other sources for that, then certainly you have the ability to do that, but I wouldn't be having it at the expense of the county of [W.I.'s] residence.

(51:3-4).

The court adjourned the hearing and scheduled the final hearing for April 21, 2022. (51:5).

On April 18, 2022, W.I. filed a motion to reconsider his request for an "independent 3rd evaluation." (33:1). W.I. argued he is indigent, he has a right to this additional examination at county expense, and that, despite the circuit court's contention, the SPD cannot fund indigent client's requests for experts. (33:1-2).

On the whole, W.I. argued that the circuit court's interpretation of "approval of the court" is inconsistent with the plain meaning of the statute and due process. (33:1). And, he argued that if indigent individuals did not have equal access to an additional examination, compared to those who can afford it at their own expense, then indigent individuals would receive "disparate treatment" and "jeopardize…[W.I.]'s constitutional right to due process." (33:1).

W.I. explained that "an independent examiner" was especially important in his case because one of the examinations ordered pursuant § 51.20(9)(a)1. was "insufficient due to the minimal time spent with [W.I.], apparent lack of time spent preparing the report…and insignificant amount of information included in the report." (33:2).

On April 20, 2022, the circuit court held a motion hearing on W.I.'s motion to reconsider. (52; App. 15-28). His trial attorney asserted that W.I. is indigent as confirmed by the SPD, and despite her best efforts, the SPD could not obtain expert funding for this examination. (52:2-4; App. 16-18). The County took no position on W.I.'s request but only raised concerns about holding the final hearing within the timelines mandated in Chapter 51. (52:5-6; App. 19-20).

The court denied W.I.'s motion to reconsider. In its decision, the court interpreted the statute to mean that the court must approve of the indigent individual's "request or petition to have" an additional medical or psychological examination at the county's expense. (52:9; App. 23). The court elaborated:

> The section goes on to indicate that the individual has a right at his or her own expense, so it does provide for the payment of that additional examination, but does then indicate or – and then there is a comma – if indigent and with approval of the court hearing the petition.
>
> So this Court reads that to be a two-part requirement; first that the…individual be indigent, and second, that the Court approve the

> petition or request to have that. To write that second portion of that out would I think be an abuse of statutory interpretation here because it is written as [“]if indigent and with the approval of the court hearing the petition,[“] so there has to be an indigent finding and there has to be approval of the court hearing the petition…

(52:9; App. 23).

The court rejected counsel’s arguments and stated:

> I think to read it the way counsel wants me to read it, that the approval of the Court involves the finding of indigency, is not a reasonable reading of the plain language of that subsection because the “and” – first of all, because “and” is included and, second of all, the approval would have been written as approval of the determination of indigency, but the statute simply provides “if indigent” so that determination is inherent in the wording of “if indigent” because if the person isn’t found indigent then it would be at his or her own expense.
>
> So, I think that combines the reasonable reading and I think really the only reasonable reading of that based on the plain language of that section is that there is both a finding of indigency and the approval of the Court, so there is some provision that allows Court oversight as to whether or not those additional evaluations will be at the county expense.

(52:9-10; App. 23-24).

Based on its interpretation, the court denied the motion to reconsider for three reasons. First, the court stated that the two previously ordered examiners were "independent" because they were not "county witnesses." (52:10-11; App. 24-25). Second, the court found that there was not a "significant" enough "difference between the two independent doctors" to "warrant the matter have an additional evaluation performed at county expense." (52:11; App. 25). Third, the court stated that W.I. had the "ability to secure funding through the public defender's office for evaluations." (52:11; App. 25).

The next day, the court held the final hearing on the County's petition to involuntarily commit and medicate W.I. (51). The County called one examiner, Dr. J. Musunuru, and a substance abuse counselor at Pathways to a Better Life, Tristan Ertman. (55:4). W.I. testified on his behalf. (53:29).

Dr. Musunuru testified that while it appeared W.I. had suicidal thoughts and thoughts regarding harming others in the past, W.I. did not have those thoughts at the time he was examined. (53:9). He stated that W.I. was "probably not" a danger to himself at the time of the hearing because W.I. had been "settling down and getting better." (53:10). He stated that "[i]f [W.I. is] in outpatient treatment generally I assume he may not be dangerous to himself at this time." (53:20).

The court found that W.I. is mentally ill, treatable, and dangerous under "the (A) section for dangerousness" ordered W.I. to be involuntarily committed and medicated via outpatient treatment. (53:42-43).

Court of Appeals briefing and decision

The court of appeals affirmed the circuit court's orders to involuntarily commit and medicate W.I. on grounds not raised by the County in the circuit court or on appeal: that W.I. failed to prove his indigency. *W.I.*, ¶9; (App. 7-8).

The court of appeals declined to address the issue briefed by the parties—was W.I. denied his right to an additional examination and to present that examiner's testimony at the hearing when the circuit court denied his request based on a good cause standard in violation of W.I.'s due process and equal protection rights? *Id.*, ¶10; (App. 8). The court also declined to determine whether W.I.'s appeal was moot, as raised by the County. *Id.*

W.I. filed a motion to reconsider on the basis that the court of appeals "erroneously decided" that W.I. did not prove his indigency. Wis. Stat. § 809.24. The court of appeals denied the motion to reconsider stating that "[n]othing in the motion alters our view of this case." (App. 11).

W.I. now petitions for review at the Supreme Court of Wisconsin.

ARGUMENT

I. This Court should grant review to determine what the circuit court must "approve" when an indigent individual exercises his or her "right" to an additional examination.

An individual facing involuntary commitment is entitled to secure an additional medical or psychological examination, and to present that examination as evidence in his defense at the final hearing, regardless of his indigency status. *See* Wis. Stat. § 51.20(9)(a)3. But, the plain language of the statute specifically protects this right for indigent people by requiring the county to pay for the additional examination. *Id*.

The plain language of the statute does not establish any other criteria to access county funds for the additional examination other than being indigent. Yet, the circuit court interpreted the statute to mean that it must approve of an indigent individual's "request or petition for" an additional examination. (52:9; App. 23). As such, the circuit court denied W.I.'s request because it believed the two initial expert reports did not present a "significant" enough dispute to warrant an additional examination.

The circuit's interpretation of the statute to include a good cause standard that applies only to indigent individuals, not their wealthier counterparts, cannot stand. This interpretation not only conflicts with the plain language of the statute, but it also

implicates the rights to due process and equal protection under the law for all indigent people in Wisconsin facing involuntary commitment and medication.

A. The plain language of § 51.20(9)(a)3. entitles indigent individuals to an additional examination at reasonable cost to the county.

When interpreting a statute, a reviewing court must begin with the statute's language and give that language "it's plain and ordinary meaning." *Mayo v. Boyd*, 2014 WI App 37, ¶11, 353 Wis. 2d 162, 844 N.W.2d 652. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex. rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

The plain language of the statute unambiguously establishes a right to all people facing Chapter 51 proceedings to secure an additional expert examination and to present that evidence at the final hearing. The only question is who will fund that examination, the individual or the county?

The plain language of the statute unambiguously answers that question. The additional examination is at the expense of the individual, unless that person is indigent. Then, if indigent, the examination will be at the reasonable expense of the individual's county of residence.

The plain language of the phrase "if indigent and with approval of the court hearing the petition" unambiguously establishes that the circuit court will be the body that signs off on the county funds for an expert to perform this examination. § 51.20(9)(a)3. The phrase is about logistics, not about imposing a different standard on indigent individuals than their wealthier counterparts.

B. The circuit court's interpretation of § 51.20(9)(a)3. conflicts with the cannons of statutory construction.

The circuit court's interpretation is not only inconsistent with the plain reading of the statute, but it also conflicts with an indigent individual's right to due process and equal protection. Unlike wealthier individuals, the circuit court decided that indigent individual's right to an additional examination is conditional—they must meet some amorphous standard that depends entirely on the judge's feelings about the case.

However, absent from the plain language of the statute is any criteria for the court to evaluate as to whether or when an indigent individual *deserves* to exercise his right to this additional examination at reasonable expense to the county. *See* Wis. Stat. § 51.20(9)(a)3. Thus, the court's invention of this standard does not comport with the clear wording of the statute.

Even if there is another plausible interpretation of the statute, the canon of constitutional avoidance asks courts to employ the meaning of the statute that avoids conflict with the constitution. *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (stating that the canon has no application absent ambiguity); *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (stating that the canon is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

Individual's subject to commitment proceedings are guaranteed due process of law. *J.W.K.*, 386 Wis. 2d 672, ¶16; *D.J.W.*, 391 Wis. 2d 231, ¶¶42-43. Likewise, the Equal Protection Clause requires that similarly situated individuals be treated equally under the law. *State v. Post*, 197 Wis. 2d 279, 322-23, 541 N.W.2d 115 (1995) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) for the proposition that where a law defines classes subject to that law, the distinctions must have "some relevance to the purpose for which the classification is made.").

As codified in the statute, "hearings…under this chapter shall conform to the essentials of due process and fair treatment…" § 51.20(5). The statute goes on to list some of these essential rights, the "right to counsel, right to present and cross-examine witnesses, the right to remain silent, and the right to a jury trial…" *Id*. However, none of these rights are essential to only those with the ability to afford them. *See*

State ex. rel. Chiarkas v. Skow, 160 Wis. 2d 123, 139, 465 N.W.2d 625 (1991) (discussing that the right to an attorney in commitment proceedings is not based on the ability to pay, and that the state or county shall pay for an attorney for any subject who cannot afford one at their own expense).

Instead, the court forced an indigent subject to grovel before the court to secure that which wealthy individuals receive unconditionally. The court invented a good cause standard not present in the statute to place unreasonable burdens on only indigent individuals. As such, wealthier individuals have a statutorily sanctioned advantage in commitment proceedings in comparison to their indigent counterparts. Such an interpretation of this statute suggests that the ability to even seek an additional examination, let alone present that evidence at the hearing, is dependent upon an ability to pay, which is neither constitutional nor consistent with the statutory language.

The court of appeals did not clarify whether the circuit court's interpretation is proper. Thus, this Court should grant review because the question of whether the circuit court has the discretion to deny indigent individual's their right to an additional examination based on a good cause standard still remains and future circuit courts can make the same mistake.

II. This Court should grant review to decide whether the statute imposes a burden of establishing indigency on the individual, and, if so, determine the criteria for deciding indigency and whether that criteria must be established prior to the appointment of an expert.

A. The court of appeal's interpretation of § 51.20(9)(a)3. conflicts with the cannons of statutory construction.

Courts must follow the plain language of the statute. *Kalal*, 271 Wis. 2d 633, ¶46. Likewise, courts cannot add words to a statute in order to give it their desired meaning. *Enbridge Energy Company Inc*., *v. Dane Cnty,* 2019 WI 78, ¶23, 387 Wis. 2d 687, 929 N.W.2d 572. Here, the court of appeals inserted a new standard that is not included in the plain language of the statute—an indigent individual must prove their own indigency before a circuit court may appoint an expert for an additional examination at county expense. *W.I.*, ¶9; (App. 7-8). This "burden" to "prove" one's own indigency before an indigent person can exercise this right attaches new, significant and determinative words which are missing entirely from § 51.20(9)(a)3.

The court of appeals' interpretation conflicts directly with due process and the legislature's clear intent to safeguard the rights of indigent individuals facing Chapter 51 proceedings. In § 51.60(1)(a), the legislature explicitly provides the right to

appointment of counsel "without the determination of indigency." This provision was added precisely because of the due process concerns in Chapter 51 cases where timelines are constricted and conducting indigency determinations on an individual in a mental health crisis can prove to be impractical. *See* 2007 Wisconsin Act 20, § 1834, Wis. Stat. § 51.60 (2007). To read in a requirement that the individual must prove indigency before securing their right to an independent examination would defeat the legislature's clear intent to ensure due process protections in Chapter 51 cases, regardless of the expense.

If there is a burden on indigent individuals to prove their own indigency before they can even request an additional examination, it raises significant questions on the practical effects of that burden. What level of proof must the evidence rise to? What standard of indigency must be proven? Will the SPD be forced to establish indigency for each client, however impractical and despite § 51.60(1)(a)? Given that wealthier individuals have unfettered access to this right, does establishing this burden implicate indigent individual's rights to due process and equal protection in these fast-paced cases?

This Court should grant review to clarify the law and establish, consistent with the statutory language, due process, and equal protection, that indigent individuals do not carry a burden to prove their indigency before the right to an additional examination may attach.

B. The court of appeal's holding that W.I. did not "prove" his indigency is wrong.

The court of appeals wrongly held that W.I. did not "prove" his indigency, and therefore, that the circuit court should have denied him an additional examination. *W.I.*, ¶9; (App. 7-8). Neither the County nor the circuit court ever contested W.I.'s indigency status—likely because it was clear to everyone that, of course, W.I. was indigent and this was not the issue being litigated in front of the circuit court.

The court never challenged W.I.'s indigency, and instead, interpreted the statute as permitting it to deny county expenses for an additional examination *despite* W.I.'s indigency. (51:3-4). The court understood W.I. to be indigent because it suggested that the SPD, the agency that exists to represent indigent clients, be able to fund W.I.'s additional examiantion. (51:3-4; 52:11; App. 25).

Likewise, the County never contested W.I.'s inability to pay, nor did the County object more generally to W.I.'s request for this additional examination at county expense. (51:2; 52:5-6; App. 19-20). Because the County conceded W.I.'s indigency, the issue was not fully litigated in the trial court, and thus, forfeited on appeal. *See State v. Milashoski*, 159 Wis. 2d 99, 107-08, 464 N.W.2d 21 (Ct. App. 1990) (holding that the prosecution conceded the issue and thus, forfeited the right to object to the defendant's standing to challenge a seizure because the issue was not fully litigated in the trial court.); *State v.*

Van Camp, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (holding that State waived argument in postconviction motion was defective by not raising the argument in the circuit court, even though the State was the respondent).

On appeal, the County argued, instead, that the statute permitted the circuit court to deny W.I.'s request for an additional examination despite W.I.'s indigency. *W.I.*, ¶7; (App. 7). And, the County argued that any different treatment of indigent individual's and nonindigent individual's ability to exercise the right to an additional examination is constitutional. *Id*. Because the County did not dispute W.I.'s indigency in its brief, the County conceded the issue on appeal. *See Wis. Dept. of Nat. Resources v. Bldg. & All Attached Structures Enchroaching on Lake Noquebay Wildlife Area*, 2011 WI App 119, ¶11, 336 Wis. 2d 642, 803 N.W.2d 86.

As a result, the court of appeals should not have decided an issue that was forfeited below and not briefed on appeal. *Id*., ¶19.

Ultimately, there are no cases, published or unpublished, addressing this important statute until the court of appeals decision in this case. Yet, this decision has opened the door to further questions and concerns about how this statute will impact indigent individuals in Wisconsin facing involtunary commitment and medication. Whether this Court holds for or against W.I., the facts of this case will help clarify § 51.20(9)(a)3. for both the courts and attorneys

handling these case where indivdiuals, often indigent, are experiencing serious mental health crises and require clearly protected rights to avoid unjust involtunary commitments and medication orders.

CONCLUSION

For the reasons stated above, the Wisconsin Supreme Court should grant this petition for review.

Dated this 20th day of October, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 4,200 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or 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 one or more initials or other appropriate pseudonym or designation 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 20th day of October, 2023.

Signed:
Electronically signed by
Megan Elizabeth Lyneis
MEGAN ELIZABETH LYNEIS
Assistant State Public Defender