STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000200

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*In the matter of the mental commitment of J.L.C.:*
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

J.L.C.,

Respondent-Appellant-Petitioner

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# PETITION FOR REVIEW

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## ISSUES PRESENTED

1. Whether the County failed to disprove that J.L.C. may be provided protective placement or protective services under chapter 55, such that he was ineligible to be involuntarily committed under chapter 51.

The jury returned a verdict finding J.L.C. mentally ill, treatable, and dangerous under the fourth and fifth standards of dangerousness set forth in Wis. Stat. §§ 51.20(1)(a)2.d. and 2.e. Under both of these standards, an individual is not dangerous if they may be provided protective placement or protective services under chapter 55. [1] *Dane Cty v. Kelly M.*, 2011 WI App 69, ¶18, 333 Wis. 2d 719, 798 N.W.2d 697 (discussing the "chapter 55 exclusion").

The court of appeals dismissed the appeal as moot. *Winnebago Cty v. J.L.C.*, No.2023AP200, unpublished slip op. ¶¶20-22 (Wis. Ct. App. Aug 23, 2023). (App.13-14).

[1] *See* Wis. Stat. § 51.20(1)(a)2.d ("[n]o substantial probability of harm exists . . . (if (respondent) may be provided protective placement or protective services under ch. 55"); Wis. Stat. § 51.20(1)(a)2.e. ("[t]he probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2.e. if . . . the individual may be provided protective placement or protective services under chapter 55. . .").

2. Whether the County made improper closing arguments when it relied on facts not in evidence about the chapter 55 exclusion and shifted the burden of proof to J.L.C.

J.L.C.'s trial counsel objected to the County's closing arguments. The circuit court overruled counsel's objections. (R.74:179-180; App.34-35).

The court of appeals dismissed the appeal as moot. *J.L.C.*, No.2023AP200, ¶¶20-22. (App.13-14).

3. Whether the court of appeals improperly dismissed J.L.C.'s appeal as moot.

The court of appeals dismissed the appeal as moot. *J.L.C.*, No.2023AP200, unpublished slip op. ¶¶20-22. (App.13-14). The court of appeals acknowledged this Court's decisions in *Marathon Cty v. D.K.*, 2020 WI 8, ¶25, 390 Wis. 2d 50, 937 N.W.2d 901 and *Sauk Cty v. S.A.M.*, 2022 WI 46, ¶27, 402 Wis. 2d 379, 975 N.W.2d 162, which held that appeals from expired commitment orders were not moot. However, the court of appeals distinguished J.L.C.'s appeal based on the fact that J.L.C. has a guardian and was convicted of a felony.[2] *J.L.C.*, No.2023AP200, ¶22. (App.14).

[2] *See* Wis. Stat. § 302.055 (Department of Corrections authority to transfer individuals to the Wisconsin Resource Center for individualized care).

## CRITERIA FOR REVIEW

J.L.C. is serving a criminal sentence, and is presently housed at the Wisconsin Resource Center. (WRC). The fact that J.L.C. is serving a prison sentence at WRC is a critical fact underlying each of the issues in this case. The County petitioned to involuntarily commit J.L.C. As grounds for dangerousness, the County alleged two standards that both contain a "chapter 55 exclusion." A person cannot be found dangerous under Wis. Stat. §§ 51.20(1)(a)2.d. or 2.e. if they may be provided protective placement or protective services under chapter 55. J.L.C. argued that the County did not disprove the chapter 55 exclusion. J.L.C. additionally objected multiple times to the County's closing arguments about the chapter 55 exclusion. The circuit court overruled his objections, and, following the jury verdict, entered an order of commitment and order authorizing involuntary medication and treatment.

On appeal, the County argued that the chapter 55 exclusion did not apply to J.L.C. based on facts specific to J.L.C., but also based on broader claims that, if accepted, would effectively mean that an individual serving a sentence at WRC can never meet the chapter 55 exclusion. This case presents the Court with an opportunity to examine and apply the chapter 55 exclusion to an individual who is serving a prison sentence and is presently housed at the WRC.

The court of appeals dismissed J.L.C.'s appeal as moot. *J.L.C.*, No.2023AP200, ¶22. (App.14). It

acknowledged that, in *D.K.*, 390 Wis. 2d 50, ¶25, this Court held that an appeal from an original commitment was not moot because of the firearm ban that was tied to the commitment order. Subsequently, in *S.A.M.*, 402 Wis. 2d 379, ¶27, this Court held that an appeal from a recommitment order was also not moot based both on the firearm ban and the liability for costs of care tied to the commitment order.

The court of appeals distinguished *D.K.* and *S.A.M.*, based on the fact that J.L.C. has a guardian and was convicted of a felony. *J.L.C.*, No.2023AP200, ¶22. (App.14). In his Appellant's Brief, J.L.C. asserted that his appeal was not moot. (Appellant's Brief at 7 n.1). The County did not respond to J.L.C.'s assertion or otherwise argue that the appeal was moot. Seven days after J.L.C.'s appeal was decided, the court of appeals decided another case involving an individual who was involuntarily committed while at the WRC. *Winnebago Cty v. C.H.*, No. 2023AP505, unpublished slip op. (Wis. Ct. App. Aug. 30, 2023). (App.55-67). The court of appeals discussed mootness at length, and suggested that the appeal was in fact moot, but decided the appeal anyway. *Id.*, ¶¶13-17. (App. 61-63). These successive opinions suggest that the issue of mootness for individuals presently serving sentences at the WRC is likely to recur.

This case presents the Court the opportunity to consider how the chapter 55 exclusion applies to individuals facing involuntary commitment while serving a prison sentence at the WRC, and also, to consider whether there is a different mootness rule for

individuals in these circumstances. These questions are not specifically fact-bound, but instead have broader application to other individuals similarly situated to J.L.C. Thus, this petition meets the criterion for review provided under Wis. Stat. § 809.62(1r)(c)3. because "a decision by the supreme court will help develop, clarify or harmonize the law" and the question presented is "not factual in nature but rather is a question of law of the type that is likely to recur unless resolved" by this Court.

## STATEMENT OF FACTS

Winnebago County filed a petition to involuntarily commit J.L.C. under Wis. Stat. § 51.20. (R.2). Accompanying the petition was a letter from J.L.C.'s treating psychiatrist, Dr. George Monese. (R.4:1). The letter explained that J.L.C. was a 67-year old man with a long history mental illness. (R.4:1). J.L.C. was diagnosed with schizophrenia and had also suffered a traumatic brain injury. (R.4:1). J.L.C. had a permanent guardianship of the person. (R.4:1). *See* Wis. Stat. § 54.10(3)(a)2. J.L.C. was serving a prison sentence, and was placed at the WRC. (R.4:1).

On June 24, 2022, the court held a probable cause hearing. (R.73). J.L.C.'s attorney made an oral motion to dismiss, arguing that there was no substantial probability of harm, as defined in the alleged standards of dangerousness—Wis. Stat. §§ 51.20(1)(a)2.d. and 2.e.—because J.L.C. had a guardian, and chapter 55 protective placement or

services could be provided to him. (R.73:4).[3] The court deferred the motion. (R.73:6).

The court appointed two examiners to examine J.L.C.: Dr. Yogesh Pareek and Dr. JR Musunuru. (R.19). Dr. Pareek later testified at trial and his report was introduced into evidence. (R.74:85, *see* R.62:1-5).

Both parties filed statement letters on July 26, 2022, about the appropriateness of a chapter 55 proceeding as opposed to a chapter 51 proceeding, given J.L.C.'s circumstances.[4] In short, the County argued that chapter 55 protective placement was not possible because J.L.C. was at the WRC. (R.43). It further asserted that, although protective services were available, there were "logistical challenges." (R.43:2). J.L.C.'s statement letter asserted the applicability of the chapter 55 exclusion, and further asserted that a medication order could be entered under Wis. Stat. § 55.14, if necessary. (R.42:1-2). At the July 29, 2022, pretrial hearing, the court determined that the chapter 51 proceeding would continue, but indicated that the issue may need to be addressed in the future because J.L.C. had been suffering from persistent mental illness for "many, many years." (R.72:3).

A jury trial occurred on August 2, 2022. (R.74). During opening arguments, J.L.C.'s counsel asserted

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[3] *See Kelly M.*, 333 Wis. 2d 719, ¶18 (discussing the "Ch. 55 exclusion").

[4] There was also significant litigation about venue; however, that issue is not on appeal.

that J.L.C. had a guardian, and that he could receive protective services under chapter 55. (R.74:55).

The County called three witness. First to testify was Dr. Pareek. He testified that J.L.C. had schizoaffective disorder. (R.74:61). He testified that J.L.C. was expressing paranoid, delusional, and violent thoughts about others. (R.74:64-65). He testified that J.L.C. was not taking medication, or might be taking medication, but did not believe that he needed it. Dr. Pareek further testified that, in his opinion, J.L.C. was not competent to make medication decisions. (R.74:65). He agreed that there was a very substantial likelihood that further deterioration and disability would result if J.L.C. was not under treatment; and if untreated, J.L.C. would likely suffer severe mental, emotional, or physical harm that would result in a loss of ability to function independently. (R74:66-67). Dr. Pareek testified that although he did not have J.L.C.'s entire history, medications are generally very beneficial, and in the past, J.L.C. had been treated with medication. (R.74:69).

Dr. Pareek acknowledged that J.L.C. had been taking Invega at the time of his evaluation, and even while on medication, he was still expressing delusions and paranoia. (R.74:75-77). Dr. Pareek testified that he was not aware of the dosage of Invega that J.L.C. was prescribed, but that the dosage varied. (R.74:75). Dr. Pareek acknowledged that he did not consider J.L.C.'s traumatic brain injury when rendering his opinion. (R.74:77-78).

J.L.C.'s attorney asked Dr. Pareek if he was aware that J.L.C. had a guardian. (R.74:79). The County objected based on relevancy. (R.74:79). The court sustained the objection. (R.74:79). J.L.C.'s attorney again asked Dr. Pareek if he was aware that J.L.C. had a guardian, and Dr. Pareek said he was not sure; however, he testified that guardians cannot force psychotropic medications. (R.74:80-81). J.L.C.'s attorney asked whether Dr. Pareek was an expert on a guardian's powers, and the County objected based on relevancy. (R.74:81). The objection was sustained. (R.74:81).

Judith Roberts, APNP, testified next. She was a nurse practitioner at WRC. (R.74:87-88). Ms. Roberts testified that J.L.C. had prostate cancer and visual impairment, as well as a traumatic brain injury and hyperlipidemia. (R.74:89). Ms. Roberts testified that J.L.C. had declined cancer treatment. (R.74:90). He was receiving palliative care and monitoring. (R.74:90). Ms. Roberts testified that the cancer was not curable, although she believed that treatment could improve J.L.C.'s quality of life. (R.74:91-92). At the time of the hearing, J.L.C. was on an injectable medication, paliperidone. (R.74:93). Ms. Roberts did not believe that J.L.C. would accept the medication voluntarily because he did not want it and did not believe that it helped. (R.74:93). Instead, J.L.C. has stated that, "the voices will never stop, you are giving me medication and it is never going to help." (R.74:96). He also stated, "I do not want to see any more doctors, I do not want any more x-rays." (R.74:97).

Ms. Roberts testified that J.L.C. had been under a guardianship since the year 2020. (R.74:99). When J.L.C.'s attorney attempted to ask more about the guardianship, the County objected on relevancy and also argued that it was a "legal question." (R.74:100-101). The court sustained the objection. (R.74:101).

The final witness was Dr. George Monese, the staff psychiatrist at WRC. (R.74:113). Dr. Monese testified that he diagnosed J.L.C. with schizophrenia. This condition was complicated by a traumatic brain injury that J.L.C. suffered in 2013. (R.74:118-122). Dr. Monese testified that J.L.C. did not believe that he had cancer. (R.74:126). Dr. Monese testified that medical and psychological medications were needed so that J.L.C.'s condition would not worsen. (R.74:128). Dr. Monese testified that he did not believe that J.L.C. was competent to refuse medication. (R.74:128). When asked by the County, Dr. Monese agreed that J.L.C. demonstrated an extremely high probability of disability or deterioration without care and treatment; would be at a high probability of lacking services necessary for his health or safety if not on commitment; and would be at a high probability of suffering severe mental, emotional, or physical harm resulting in his inability to function independently. (R.74:129-130, 133).

Dr. Monese acknowledged that J.L.C.'s traumatic brain injury is permanent. (R.74:136). He further acknowledged that J.L.C. has been under a guardianship of the person since 2020. (*See* R.63:8-13). His guardian has the authority to consent for

medication to treat J.L.C.'s physical conditions. Dr. Monese testified that J.L.C. continued to experience hallucinations and delusions even while on medication, but that it was to a lesser degree. (R.74:140-141). Dr. Monese testified that J.L.C.'s mental illness could not be cured, only attenuated. (R.74:146). J.L.C.'s attorney asked Dr. Monese, "are you aware that the D Standard[5] states there is not a substantial probability of harm if the individual may be provided protective placement or services under Chapter 55?" The County objected, saying it was a "legal question" and "a bit of a misrepresentation, as there is no protective placement…" and the court sustained the objection. (R.74:144-145).

After the close of evidence, the court instructed the jury on two dangerousness standards, Wis. Stat. §§ 51.20(1)(a)2.d, and 2.e.(R.60:9-10, R.74:159-162).

During closing argument, the County focused on J.L.C.'s unwillingness to accept treatment for his medical conditions. (R.74:167-169; App. 22). The County argued that treating J.L.C.'s mental illness would lead him to accept treatment for his medical conditions. (R.74:169; App.24). The County argued that, although J.L.C.'s condition was not curable, there was potential for treatment. (R.74:170; App.25).

J.L.C.'s counsel argued that J.L.C.'s mental condition was not treatable; and in fact, he was experiencing hallucinations and delusions while

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

medicated. In addition, a traumatic brain injury cannot be cured. (R.74:172,177; App.27, 32). In addition, counsel argued that J.L.C. should have a say in his medical treatment. (R.74:175-177; App.30-32). Also, his medical care could be managed by his guardian. (R.74:175; App.30). Finally, J.L.C. argued that the County did not prove that J.L.C. could not be provided care under chapter 55: "[i]t's their burden to show that, no, he can't get these protective placements, no, he can't get these protective services. It is their burden to tell you that he can't get them. And they didn't tell you that at all." (R.74:176; App.31).

In rebuttal, the County stated that it did not have a "duty to come in here and bring a social worker in here and do a separate report for protective services or placement." (R.74:179; App.34). The County then argued that a chapter 55 was not feasible: "[w]e haven't heard anything about the feasibility of protective placement. I would know because I do those. I do those in addition to the 51s. And, if anything, that would be a witness for the defense to bring in." (R.74:179; App.34). Then the County began to go through Wis. Stat. § 55.12(2) saying, "let me explain to you why protective services and placement aren't a possibility, or this is all per statute. It's not my opinion." (R.74:179-180; App.34-35).

J.L.C.'s attorney objected, but her objection was overruled. (R.74:179-180; App.34-35). The County argued that, the statute, "[d]isallows commitment to a treatment care facility. That is exactly what the

Wisconsin Resource Center is." (R.74:180; App.35). The County proceeded to argue that there were practical reasons why protective services were not a possibility. It turned to the patients' rights provision of Wis. Stat. § 55.23(1). (R.74:180; App.35). J.L.C.'s attorney again objected, stating this was not testified to. (R.74:180; App.35). The court responded, "[t]his is statutory. It is the law," and overruled the objection. (R.74:180; App.35). The County proceeded to argue that, "[t]he state prison system has an inherent and overwhelming interest in the security of not only the people that work there, but the people that live there, the other inmates. And it really is at odds with what the defense here is suggesting we should do. It just can't be done." (R.74:180; App.35).

The jury returned verdicts finding that the elements for commitment were met. (R.65). As to the standard of dangerousness, the jury selected both Wis. Stat. §§ 51.20(1)(a)2.d, and 2.e. (R.65:1). The circuit court entered written orders of commitment. It also entered an order authorizing involuntary medication and treatment. (R.49; App.17-18), (R.50; App.19-20).

J.L.C. appealed. First, he argued that the County failed to prove that the chapter 55 exclusion did not apply to him. Second, he argued that the County engaged in improper closing arguments when it relied on facts not in evidence about the chapter 55 exclusion and shifted the burden of proof to J.L.C. He asserted that the appeal was not moot even though the order has expired, with citation to *S.A.M.*, 402 Wis. 2d

379, ¶27. The County did not argue that the appeal was moot.

The court of appeals affirmed. It set forth a lengthy rendition of the case and facts, but ultimately declined to reach the merits. Instead, the court of appeals held that the appeal was moot. *J.L.C.*, No.2023AP200, ¶¶20-22. (App.13-14). It stated that. "our supreme court concluded in *Marathon County v. D.K.* . . that appeals from expired initial commitment orders are not moot because of collateral consequences such as a firearms ban," but found "that circumstance does not apply here," because J.L.C. is also subject to a firearms ban under his guardianship order and based on his felony conviction. *Id.*, ¶20. (App.13-14). The Court disagreed that *S.A.M.* stands for the principle that appeals from commitment orders are categorically not moot just because they have expired, and held that, "J.L.C. does not identify any ongoing collateral consequences causally related to the expired initial commitment order in this appeal." *Id*, ¶¶21-22. (App.13-14). J.L.C. filed a motion for reconsideration, arguing that the appeal was not moot or, alternatively, that it met an exception to the mootness doctrine. The court of appeals denied the motion in a three-line order.

## ARGUMENT

### I. The County failed to disprove the chapter 55 exclusion, and therefore failed to prove that J.L.C. was dangerous as defined in Wis. Stat. §§ 51.20(1)(a)2.d and e.

A. Legal standards.

The chapter 51 and chapter 55 systems share certain commonalities. *State ex re. Watts v. Combined Community Serv. Bd of Milwaukee Cty*, 122 Wis. 2d 65, 74, 362 N.W.2d 104 (1985). Both chapters concern individuals who are suffering from mental conditions. Wis. Stat. §§ 51.20(1)(a)1, 51.45(13) and 55.06(2)(c). Both chapters require a finding of dangerousness before involuntary commitment or placement can be imposed. Wis. Stat. §§ 51.20(1)(a)2, 51.45(13)(a)2, 55.06(2)(c).4 Both chapters require treatment in the least restrictive alternative. Wis. Stat. §§ 51.20(13)(f), 51.45(13)(g), 55.06(9)(a)5. And both chapters afford their patients' rights after the commitment or placement has been made. *See* Wis. Stat. §§ 51.61 and 55.07. *See Watts*, 122 Wis. 2d. at 71-73.

However, they differ in other fundamental ways. At its most basic terms, chapter 51 is designed to serve individuals with a treatable mental illness, whereas chapter 55 is designed to serve individuals with permanent (or likely to be permanent) conditions, including "serious and persistent" mental illness, degenerative brain disorder, developmental disabilities, or other "like incapacities." *See* Wis. Stat. §55.01(6v); *Fond du Lac County v. Helen E.F.*, 2012 WI

50, ¶21, 340 Wis. 2d 500, 814 N.W.2d 179, Furthermore, chapter 51 commitments are of limited duration—either six or twelve months—whereas chapter 55 protective placements are indefinite, with a right to yearly review. And in order to protectively place an individual or impose protective services, the individual must also have a guardianship of the person. Wis. Stat. § 55.06.

Some individuals meet both chapter 51 and chapter 55 standards, as the systems are not mutually exclusive. *See Kelly M.*, 333 Wis. 2d 719, 22. However, if an individual may be provided protective placement or protective services under chapter 55, they cannot be committed under Wis. Stat. §§ 51.20(1)(a)2.d. or 2.e. In *Kelly M.*, 333 Wis. 2d 719, ¶18, the court of appeals discussed the chapter 55 exclusion, stating that, "[t]he evident purpose as expressed in the text is to avoid commitment for treatment if it is reasonably probable. . . that placement or services available under Wis. Stat. ch 55 will provide the needed treatment." *Kelly M.*, 333 Wis. 2d 719, ¶21. For the chapter 55 exclusion to apply, the individual does not need to be currently receiving protective placement or services. *Id.*, ¶24. Instead, "[t]his exclusion also may apply to an individual who is not yet subject to a ch. 55 order but who is eligible for one." *Id.*, ¶32.

Application of the chapter 55 exclusion involves construction of the chapter 51 and 55 statutes. Statutory construction is a question of law, subject to de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156. In considering the

sufficiency of the evidence, 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.

B. The County failed to prove that J.L.C. could not "be provided protective placement or protective services under ch. 55."

The County failed to disprove the chapter 55 exclusion. It failed to elicit any evidence from its witnesses about the applicable legal standards or their application to J.L.C. In fact, the County objected to J.L.C.'s attempts to question witnesses about the issue. (R.74:81, R.74:100-101; R.74:144-145). In an involuntary commitment, "[t]he petitioner must prove that commitment is appropriate by clear and convincing evidence." *D.K.*, 390 Wis. 2d 50, ¶28; Wis. Stat. § 51.20(13)(e).

Not only did the County fail to elicit evidence to disprove the chapter 55 exclusion, the evidence that was admitted in fact supported the exclusion. Under Wis. Stat. § 55.08(2), there are two elements for protective services. First, "[t]he individual has been determined to be incompetent by a circuit court or is a minor who is alleged to have a developmental disability and on whose behalf a petition for a guardianship has been submitted." Wis. Stat. § 55.08(2)(a). J.L.C. had been under a guardianship pursuant to Wis. Stat. § 54.10(3)(a) since the year

2020. (R.63:8-12; *see also*, R.74:99). He was deemed incompetent due to "serious and persistent mental illness." (R.63:9).

Second, there must be a showing that, "[a]s a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided." Wis. Stat. § 55.08(2)(b). Here, the testimony demonstrated that J.L.C. has at least one permanent condition that would qualify him under chapter 55—the traumatic brain injury.

The County focused on its belief that J.L.C. needed be required to take psychotropic medication. (*See e.g.*, R.74:66, 128). However, an involuntary medication order is available under chapter 55, under a different procedure. *See* Wis. Stat. § 55.14(2). The County did not prove that a medication order could not be obtained under chapter 55. In its pretrial statement letter, the County conceded that an involuntary medication order could be obtained under either chapter. (R.43:1). Protective services also include counseling and referral for services, coordination of services, tracking and follow-up, case management, legal counseling or referral, diagnostic evaluation, and "any service" that will keep the individual "safe from abuse, financial exploitation, neglect, or self-neglect or prevent the individual from experiencing deterioration

or from inflicting harm on himself or herself or another person." Wis. Stat. § 55.01(6r)a-k.

On appeal, the County argued first that the chapter 55 exclusion did not apply because J.L.C.'s schizophrenia is "not incurable." (Resp. Br. at 6). During closing argument, the County conceded that J.L.C.'s condition was not curable. (R.74:178; App.33). Regardless, the statutory standard is not whether someone is "curable." Instead, Wis. Stat. § 55.08(1)(d) uses the terms "permanent" or "likely to be permanent."[6]

The County also argued that the chapter 55 exclusion does not apply because J.L.C. could not be protectively placed at the WRC—the reason being that WRC is a treatment facility. (Resp. Br. at 22-23).[7] However, even if J.L.C. cannot currently be protective placed does not mean that a chapter 51 commitment is warranted. If he can be provided protective services, he can remain at the WRC without a chapter 51 commitment—which was the situation prior to the commencement of this chapter 51 action. (*See* R.4:1).

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[6] In *J.W.J.*, 375 Wis. 2d 542, J.W.J. argued that he could not be committed because his schizophrenia could not be cured. The Court determined that treatability encompasses rehabilitation and "rehabilitation is not synonymous with cure." *Id.*, ¶32.

[7] *See* Wis. Stat. § 55.12(2) ("[n]o individual who is subject to an order for protective placement or services may be involuntarily transferred to, detained in, or committed to a treatment facility for care except under s. 51.15 or 51.20").

As for why J.L.C. is purportedly not eligible for protective services, the County made a conclusory assertion that protective services would be "unwieldy and inappropriate" at the WRC. (*See* Resp. Br. at 23). This was conjecture. The County could have presented evidence about the availability and feasibility of protective services and chose not to. It is not credible to argue that receiving services such as case management, counseling, and diagnostic evaluation "make little sense" just because J.L.C. was currently housed at the WRC. (*See id*. at 23-24).

The County's position was, effectively, that the chapter 55 exclusion does not apply to individuals who are subject to chapter 51 commitment petitions while placed at the WRC. Yet, the Legislature did not carve out an exception to the chapter 55 exclusion for individuals at the WRC. Courts should not carve exceptions to statutes where the Legislature has expressed none.

## II. The County made improper closing arguments when it relied on facts not in evidence regarding the chapter 55 exclusion and shifted the burden of proof to J.L.C.

In its closing argument, the County relied on facts not in evidence and shifted the burden of proof to J.L.C. The County stated that it did not have a "duty to come in here and bring a social worker in here and do a separate report for protective services or placement." (R.74:179; App.34). The County asserted

that a chapter 55 was not feasible: "[w]e haven't heard anything about the feasibility of protective placement. *I would know because I do those*. I do those in addition to the 51s. And, if anything, that would be a witness for the defense to bring in." (R.74:179; App.34) (emphasis added). Then, the County began to go through Wis. Stat. § 55.12(2) saying, "let me explain to you why protective services and placement aren't a possibility, or this is all per statute. It's not my opinion." (R.74:179; App.34). J.L.C.'s multiple objections were overruled. (R.74:179-180; App.34-35).

The County's arguments were improper in two ways. First, the County relied on facts not in evidence. The County attorney's personal experience "do[ing] these" is not a fact in evidence. *See State v. Smith*, 2003 WI App 234, ¶26, 268 Wis. 2d 138, 671 N.W.2d 854 (prosecutor's assertion that he "knew" the testifying police officers were hard workers was improper because there was "no evidentiary basis for the officers' work habits or job demands, or the basis for the prosecutor's knowledge of them"). The applicability of the chapter 55 elements was also not in evidence. The County could have presented testimony from witnesses about the legal standards and how those standards applied to J.L.C.'s circumstances, but it chose not to. The County argued about the "inherent and overwhelming interest in the security" at WRC that conflicted with chapter 55 provisions. (R.74:180; App.35). Again, the County did not present any witness to testify about WRC's security interests, let alone how they are or are not compatible with chapter 55 provisions.

Second, the County engaged in improper burden-shifting. The County argued that a chapter 55 was not feasible, "[a]nd if anything, that would be a witness for the defense to bring in." (R.74:179; App.34). J.L.C. did not have an obligation to bring in any witnesses or evidence. The County bears the burden of proof on every element of a mental commitment.

Overall, the County's closing arguments subverted the burden of proof by arguing outside the evidence and shifting the burden of proof to J.L.C. This "so infected the trial with unfairness" as to make the commitment "a denial of due process." *See State v. Mayo*, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115.

But for the improper arguments, the jury would have evaluated the County's case based only on the properly-admitted evidence and under the correct burden of proof. Doing so would have resulted in a finding that the County failed to disprove the chapter 55 exclusion, and therefore, failed to prove that J.L.C. was dangerous under Wis. Stat. §§ 51.20(1)(a)2.d. and 2.e. Therefore, the improper arguments were not harmless. *See Martindale v. Ripp*, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698 (error is not harmless when there is a reasonable possibility that it contributed to the outcome of the proceeding).

## III. J.L.C.'s appeal is not moot just because he has a guardian and was convicted of a felony.

In his Appellant's Brief, J.L.C. asserted that the appeal was not moot even though his commitment order had expired. (App. Br. at 7, n.1). He cited to this Court's decision in *S.A.M.*, 402 Wis. 2d 379. ¶27. In *S.A.M.*, this Court determined that an appeal from an expired recommitment order was not moot, based on "two of the order's collateral consequences"—the ability to restore the right to possess a firearm, and liability for the cost of care received while subject to the recommitment order. *Id.* In its Response Brief, the County did not respond to J.L.C.'s assertion on mootness and did not argue that the appeal was moot. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 (arguments not rebutted on appeal are deemed conceded). Given the County's implicit concession, J.L.C. did not discuss mootness in his Reply Brief.

In *Walworth Cty v. M.R.M.*, 2023 WI 59, ¶13, 408 Wis. 2d 316, 992 N.W.2d 809, this Court applied *S.A.M.*'s mootness holding in an unqualified manner, holding that reversal would provide meaningful relief to M.R.M. even though his commitment order expired because "reversing that unlawful extension order will . . . reliev[e] M.R.M. from the order's collateral consequences, such as restrictions on his constitutional right to bear arms and liability for the cost of his care. *See Sauk County v. S.A.M.*, …." The

Court did not discuss M.R.M.'s own firearm ban or his liability for his own personal costs of care. *See id.*

Similarly, in *Outagamie Cty. v. L.X.D.-O.*, 2023 WI App 17, ¶22, 407 Wis. 2d 441, 991 N.W.2d 518, the court of appeals stated that, "[i]t is now well established under Wisconsin law that an appeal of an expired commitment order—whether an initial commitment order or a recommitment order—is not moot due to continuing collateral consequences of the firearms ban required under a commitment order, as well as liability for the cost of care."

Yet, here, the court of appeals returned to a case-by-case mootness analysis and determined that J.L.C.'s appeal was moot. Notably, the court of appeals only addressed the firearm ban. *See generally, J.L.C.*, No. 2023AP200, ¶¶20-22. (App.13-14). The court of appeals noted that J.L.C. had a guardianship and, without citation, argued that the guardianship resulted in an independent firearm ban. *Id.*, ¶20. (App.13-14). In addition, the court of appeals noted that J.L.C. had been convicted of a felony. *Id.* First, a person can seek review of a guardianship order. Wis. Stat. § 54.64. Second, individuals can obtain relief from convictions on direct appeal and through collateral postconviction motions. *See* Wis. Stat. §§ 809.30; 974.06. The fact that there is a firearm ban attached to *this order* that is on appeal is sufficient to render the appeal not moot.

Furthermore, the court of appeals here did not consider J.L.C.'s liability for the costs of care under Wis. Stat. § 46.10(2). The cost of care related to each commitment is tied to that particular commitment period. *S.A.M.*, 402 Wis. 2d 379, ¶24. If a commitment is reversed, the liability no longer exists. *Id*. In *S.A.M.*, this Court rejected the court of appeals' conclusion that S.A.M. was required to show his "actual monetary liability," stating that this position "misses the mark" because Wis. Stat. § 46.10(2) is mandatory and "it is enough to overcome mootness when there is the 'potential' for collection actions because of the liability." *Id*., ¶25.

Finally, even if this appeal is deemed moot, several exceptions to the mootness doctrine apply to J.L.C.'s appeal, including that: "the issue is likely to arise again and should be resolved by the court to avoid uncertainty;" and, the issue is "capable and likely of repetition and yet evades review." *L.X.D.-O.*, 407 Wis. 2d 441, ¶15. This issue is likely to recur and evade review because J.L.C. has a persistent mental illness and is serving a lengthy prison sentence at the WRC. Additionally, application of the chapter 55 exclusion to an individual residing at the WRC is a question that is likely to recur, and because of the short duration of commitment orders, is likely to evade review.

## CONCLUSION

For the reasons stated above, J.L.C. respectfully asks the Court to grant his petition for review.

Dated this 11th day of October, 2023

Respectfully submitted,

*Electronically signed by Colleen Marion*
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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 5,539 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 11th day of October, 2023.

Signed:
*Electronically signed by*
*Colleen Marion*
COLLEEN MARION
Assistant State Public Defender