STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP215

In the Matter of the Mental Commitment of D.E.W.:

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

D.E.W.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

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ISSUES PRESENTED

1. What kind of testimony must the County present to satisfy the "reasonable explanation" requirement in Wis. Stat. § 51.61(1)(g)4?

The circuit court granted the County's request for an involuntary medication order. D.E.W. appealed and the court of appeals affirmed, holding that the doctor's testimony sufficiently complied with the statutory language.

2. Does this Court's decision in *Winnebago County v. Christopher S.*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109 permit the court of appeals to uphold a finding that the patient is incompetent to refuse medication based on "conclusory" testimony from the testifying doctor so long as the lower court finds that testimony "credible?"

The circuit court granted the County's request for an involuntary medication order. D.E.W. appealed and the court of appeals affirmed, holding that this Court's decision in *Christopher S.* permitted it to affirm an order based solely on admittedly "conclusory" testimony.

CRITERIA FOR REVIEW

Review is necessary in this case under several of the enumerated criteria.

First, pursuant to Wis. Stat. § 809.62(1r)(a), this case presents a "real and significant question of federal or state constitutional law" as it involves the requirements that agents of the state must satisfy before overcoming a person's constitutionally protected right to refuse medication.

Second, the case presents a "question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. § 809.62(1r)(c)3. As will be demonstrated in this petition, there are numerous court of appeals decisions addressing challenges to involuntary medication orders. Those decisions are incompatible with one another and with decisions of this Court. Clarifying what testimony is required at a hearing, and what evidence must be in the record to affirm on appeal, will have an obvious and immediate impact on hundreds of pending and future cases.

Third, there is disagreement among the various citable decisions of the court of appeals as to how this Court's precedents regarding involuntary medication orders are to be applied. These decisions are incapable of harmonization and, hence, this discordant state of affairs requires intervention by this Court under Wis. Stat. § 809.62(1r)(d).

Essentially, there are two general issues requiring resolution by this Court. The first deals with the threshold requirement for obtaining an involuntary medication order—proving that the committed person has received a "reasonable" explanation of the particular medication the County

seeks to administer. As this Court held in *Outagamie County v. Melanie L.,* 2013 WI 67, ¶ 67, 349 Wis. 2d 148, 833 N.W.2d 607, the County must establish that the person received a "reasonable explanation" which includes "why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication."

However, despite the clarity of Wis. Stat. § §51.61(1)(g)4's statutory language and the unambiguous holding of this Court, lower courts have struggled to consistently apply those requirements in appeals of involuntary medication orders. Courts disagree as to how much explanation is required and what specific topics must be covered in the doctor's testimony. Pertinent to this appeal, the court of appeals—District II specifically[1]—has repeatedly held that, despite the plain language of the statute referencing a "particular medication," there is in fact no requirement that the medication at issue be named in the doctor's testimony; inferential proof is claimed to be sufficient.

Even aside from this specific sub-issue—whether the medication needs to be named in the

[1] District II's geographic coverage includes both the Winnebago Mental Health Institute (WMHI) and the Wisconsin Resource Center (WRC), two facilities housing mentally ill persons commonly subject to involuntary medication orders; as a result, District II issues a disproportionate number of unpublished but citable decisions on this topic.

doctor's testimony—a review of the case law reveals an even broader spectrum of disagreement as to how rigorously the court of appeals ought to review the evidence in assessing the County's compliance with the "reasonable explanation" requirement. As will be shown, there is virtually *no* consistency in how this requirement has been applied in the court of appeals; lacking more precise guidance, it remains impossible to discern what is actually required of a testifying doctor in a medication hearing.

Because uncertainty and confusion persist in the court of appeals, this Court should accept review to clarify and reaffirm its prior holdings and, in so doing, harmonize the discordant application of those precedents in the court of appeals. Doing so will not only resolve a commonly-litigated appellate issue but also assist lower court actors in conducting medication hearings that are consistent with due process guarantees, statutory requirements and case law.

The second issue also deals with the quantum of evidence required at a medication hearing, but focuses on the second and third prongs of the statutory framework—the incompetency standards in Wis. Stat. § 51.61(1)(g)4.a or b. These statutory standards matter; they are the only mechanisms allowing the County to overcome the person's otherwise constitutionally-protected right to refuse life-altering psychotropic medication. However, despite the laundry list of factors this Court has identified as being useful in assessing incompetency, the court of appeals believes that this Court has deliberately

encouraged a less-stringent standard of review. Indeed, under the court of appeals' reading of this Court's precedent, even "conclusory" testimony—so long as it is credited by the circuit court—will be enough to overcome an otherwise constitutionally-protected right of refusal. This Court should therefore accept review to clarify, and hopefully reaffirm, the strong requirements imposed on the County as established by past precedent.

While D.E.W. acknowledges that sufficiency challenges do not ordinarily merit review, here, in conjunction with a request that this Court revisit, clarify, and reaffirm its past precedents, application of those precedents to this fact pattern can therefore provide an illustrative lesson for lower court actors assessing future requests for involuntary medication. Accordingly, D.E.W. asks this Court to accept review and reverse.[2]

[2] The court of appeals brief actually presented a third issue, related to a hearsay objection. While D.E.W. also believes that this issue of hearsay testimony in Ch. 51 proceedings is a statewide problem that will eventually require the intervention of this Court, he concedes that the court of appeals' treatment of that issue makes it a poor candidate for review. If this Court, on its own motion, elects to accept review of that issue, however, he welcomes the opportunity to discuss it in this forum.

STATEMENT OF FACTS

This case arises in context of a petition to extend Darren's[3] Chapter 51[4] involuntary mental commitment with an accompanying petition for involuntary medication and treatment. (2:1). In its pleadings, the County alleged that Darren, an inmate in the Wisconsin prison system, was "not competent to refuse medication and treatment." (2:1).

The circuit court, the Honorable Scott C. Woldt presiding, held a hearing on the petition. (22); (App. 16). The County's expert witness was Thomas John Michlowski, the medical director at the Wisconsin Resource Center. (22:4); (App. 19). Based on his interactions with Darren as well as his review of the medical records, Dr. Michlowski diagnosed Darren with schizoaffective disorder. (22:5); (App. 20).

Dr. Michlowski believed that Darren was a "proper subject for commitment" because "he is mentally ill, and the illness that he has can be treated with medication and, for court purposes, would not interfere with his ability to assist counsel in any future proceedings and, to the contrary, would help him to do so."[5] (22:6); (App. 21). Dr. Michlowski also asserted

[3] Pseudonym.

[4] Wis. Stat. § 51.20.

[5] At the time Dr. Michlowski testified, Darren did not have any pending court cases. He had already been convicted and sentenced in Milwaukee County Case No. 17CF344 and his deadline for pursuing any kind of appeal had long lapsed, according to records available online.

that medication would "help [Darren] to engage in a general population setting and enjoy whatever benefits he can from that." (22:9); (App. 24).

As to that unnamed medication, Dr. Michlowski asserted that it would "have a therapeutic value" for Darren. (22:9); (App. 24). When asked to cite an advantage of medication, the doctor testified:

> The -- well, one of the advantages would be help him with his thought processes so that he could think in a more logical way and be able to carry a concept to its logical conclusion in a socially acceptable way and help him not to believe that people are persecuting him in various ways.
>
> And there are other advantages, and those would be to prevent and control to help him control his mood and his affect, which is quite problematic. For example, evidence just last week where he was very disruptive with the nurses and had to be placed on a high management unit.

(22:10); (App. 25).

When asked what "disadvantages [were] covered" with Darren, the doctor testified:

> Well, as is true with any medication, there – no medication is free of side effects. So there could be common side effects that effect the central nervous system such as dizziness, lightheadedness, the gastrointestinal system, upset stomach. And then more serious general metabolic effects such as developing diabetes, which I discussed in detail with him.

(22:11); (App. 26). Dr. Michlowski further testified that he discussed the following alternatives with Darren: "individual therapy, group therapy, various programs that are conducted at WRC." (22:11); (App. 26).

It was Dr. Michlowski's belief that Darren was not "capable of expressing an understanding of those advantages, disadvantages, and alternatives[.]" (22:11); (App. 26). As grounds for that belief, Dr. Michlowski cited a past refusal of medication (after initial agreement) as well as a situation where Darren allegedly "lied" to a nurse practitioner about the medication side effects. (22:11-12); (App. 26-27). Dr. Michlowski also explained that Darren's food was being carefully monitored because a side effect "could be" diabetes. (22:13); (App. 28). Darren's attempts to barter for additional food in exchange for taking his medication were therefore cited as evidence of his incompetence to exercise his right to refuse medication. (22:12-13); (App. 27-28).

Relevant to the medication issue, Darren testified and told the court that he was just "trying to be on my best behavior, take my medication, and go to school, and learn how to read." (22:25); (App. 40).

The circuit court granted the County's request to extend Darren's mental commitment, finding that he would become dangerous but-for recommitment under Wis. Stat. § 51.20(1)(a)b. (22:28); (App. 43). As to the medication order, the court ruled:

> As far as medication is concerned, I'll issue a medication order. He indicates that he's willing to take the medication, but the records are complete with him using medication as a tool to get what he wants. So we need to take that tool away so he gets the treatment in which he needs. The treatment would not impair his ability to participate in his future legal proceedings. Therefore, issue a medication order.

(22:27-28); (App. 42-43).

Darren appealed and the court of appeals affirmed. As to the sufficiency of the doctor's testimony with respect to the "reasonable explanation" requirement, the court of appeals concluded there was no legal requirement that the specific medicine at issue be named in court. *Winnebago County v. D.E.W.*, 2023AP215, ¶ 12, unpublished slip op., (Wis. Ct. App. July 26, 2023). (App. 8). While the doctor did not describe the medication at issue, the court was comfortable infering that the doctor had discussed "some" medication with Darren and it believed that this inference was sufficient to reject Darren's legal arguments. *Id*. After a brief review of the record evidence with respect to the overall sufficiency of the explanation Darren received pursuant to Wis. Stat. §51.61(1)(g)4, the court of appeals likewise concluded that the record "support[ed]" the lower court's medication order. *Id*.

As to whether the County had proven that Darren was incompetent, the court of appeals cited to this Court's decision in *Christopher S.* for the

proposition that "largely conclusory" testimony is sufficient to meet the statutory standards. *Id.*, ¶ 14. (App. 10). Even though "more detail […] might have been helpful," the court of appeals was satisfied that the doctor's testimony sufficiently "mirrored" the statutory requirements. *Id.*, ¶ 17. (App. 12). It specifically concluded, "[w]hether the additional evidence supporting Michlowski's opinions is thin or plentiful, the court here found Michlowski credible, so his testimony as to both subdivs. a. and b. carried the day." *Id.,* ¶ 20. (App. 14).

This petition follows.

ARGUMENT

I. This Court should accept review to determine what testimony the County must elicit at a medication hearing to comply with the "reasonable explanation" requirement of Wis. Stat. § 51.61(1)(g)4.

A. This Court should accept review and clarify whether the doctor's testimony must reference a "particular medication."

Wis. Stat. § 51.61(1)(g)4 requires, as a condition precedent to a finding of incompetency, the County to establish that the patient received an explanation of "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment." Likewise, this Court has also discussed, in expanding on this "reasonable explanation"

requirement, that the doctor's testimony should reference the "particular drug" at issue. *Melanie L.*, 2013 WI 67, ¶ 67. Thus, it would appear from these authorities that, in a case where the doctor does not describe the "particular" medication or drug explained to the patient, then the County will not have complied with the "reasonable explanation" requirement and its request for an involuntary medication order should be denied. In this case, Darren argued that his medication order should have been reversed, as the doctor failed to discuss a particular medication during the testimony; as a result of that fatal flaw, Darren argued it was impossible for the County prove it had sufficiently explained the advantages and disadvantages of any "particular" drug.

The court of appeals, however, does not consistently recognize any such requirement. Thus, in *Winnebago County v. P.D.G.* (*P.D.G. I*"), 2022AP606-FT, ¶ 28, unpublished slip op., (Wis. Ct. App. September 7, 2022); (App. 102), the court of appeals faulted P.D.G. for identifying no law in support of his argument that the doctor's testimony was infirm because it did not reference a "particular" medication or drug. Following its own persuasive authority, the court of appeals therefore cited to *P.D.G.* as a basis for denying relief to Darren. *D.E.W.,* ¶ 12. (App. 8).

Because this case is the second example of the court of appeals appearing to deviate from plain statutory requirements and the prior holdings of this Court, this Court must accept review to clarify whether these "persuasive" authorities fairly restate

its precedents. In resolving this conflict, the Court will assist Ch. 51 litigants and their attorneys in understanding what kinds of claims are cognizable in this context. It will also make help testifying doctors to ensure that their expert testimony meets legal requirements and guide lower court decision makers ruling on challenges to a proposed medication order at a contested hearing.

Accordingly, this Court should accept review and, for the reasons set forth in the court of appeals briefing, reverse.

B. This Court should accept review and clarify how robust the testimony must otherwise be in order to uphold a medication order.

While the "particular" medication or drug issue is one facet of the "reasonable explanation" requirement meriting review from this Court, review is also needed to broadly harmonize the law as to this threshold evidentiary requirement in involuntary medication hearings.

As stated above, the statute itself requires, as a condition precedent to a finding of incompetency, that the County provide an explanation as to "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment […]." Wis. Stat. § 51.61(1)(g)4. As this Court has twice held, this imposes an intentionally stringent burden on the County to prove that the person in fact received an "adequate" or "reasonable" explanation. *Virgil D. v.*

Rock County, 189 Wis.2d 1, 5, 524 N.W.2d 894 (1994); *Melanie L.*, 2013 WI 67, ¶ 67. *Melanie L.* makes clear that this threshold showing cannot be established via conclusory testimony; instead, the County needs to prove its expert had a meaningful discussion with the patient and, ideally, back up that testimony with documentary evidence establishing the "timing and frequency" of such explanatory discussions. *Melanie L.,* 2013 WI 67, ¶ 67.

At least based on *Melanie L.*, the requirements for a petitioner seeking an involuntary medication order appear quite clear. As a result, petitions granted absent compliance with those requirements *should* be easily reversed in the court of appeals. That, however, is not the reality. Instead, the court of appeals has actually struggled to consistently apply these precedents and, in fact, evinces wholehearted disagreement as to what the legal requirements are.

For example, at one end of the spectrum is *Milwaukee County v. D.H.*, Appeal No. 2022AP1402, unpublished slip op., (Wis. Ct. App. March 7, 2023); (App. 53), wherein the court of appeals applied an exceedingly stringent "reasonable explanation" requirement to reverse a challenged medication order. It scrutinized the doctor's testimony—testimony more robust than what was presented in this case—and identified specific weaknesses with respect to the explanation for individual drugs as a basis for reversal. *Id.*, ¶¶ 17-19. (App. 62-63). Under the law as interpreted by *D.H.*, Darren's challenge easily succeeds on appeal; not only did the doctor not name

the specific medication, but also his overall explanation clearly falls far short of the level of specificity required by this persuasive authority.

However, there is another end of the spectrum and it is occupied by an equally "persuasive" decision applying a totally different standard. That case is *Marquette County v. T.F.W.*, Appeal No. 2015AP2603-FT, ¶ 12, unpublished slip op., (Wis. Ct. App. March 24, 2016); (App. 50), where the court of appeals rejected an argument "that *Melanie L.* requires detailed testimony about what the patient was told." In between these two poles—establishing totally contradictory standards of review—lie numerous unpublished, yet citable, decisions of the court of appeals.

This inconsistency cannot be maintained; under the current state of the law, there is no way to predict how the court of appeals will treat a medication appeal and what standard it will apply when interpreting this Court's "reasonable explanation" requirement. More problematically, at least some of this confusion stems from this Court's intervening decision in *Christopher S.*, meaning that this is an area of law uniquely suited for this Court's review and clarification.

Christopher S. is a decision that was centrally concerned with a totally distinct issue—a facial challenge to the constitutionality of Wis. Stat. § 51.20(1)(ar). *Christopher S.,* 2016 WI 1, ¶ 24. As a tag-along issue, the Court was also asked to assess the sufficiency of the evidence supporting the involuntary

medication order. *Id*., ¶ 48. In upholding the circuit court's involuntary medication order, this Court did not delve deeply into the "reasonable explanation" requirement and its analysis does not engage much with those legal requirements. Instead, the Court explained that, because the doctor's testimony was "not disputed" it was "not necessary" for the doctor to give a more robust explanation of what she told the respondent. *Id*., ¶ 56. Justice Abrahamson, in a partial concurrence, explained that she did not understand the majority opinion to be departing from the usual rule requiring proof that the doctor sufficiently explained the advantages, disadvantages, and alternatives to the patient. *Id*., ¶ 96 (Abrahamson, J., *dissenting in part; concurring in part*). Instead, she understood the majority opinion to be affirming because of the unique record "in this case" where the sufficiency of the doctor's explanation was not disputed in the lower court. *Id*.

At no point did this Court claim to be overruling *Virgil D.* or *Melanie L.* Yet, lower courts discern the case as creating *some* change in the law relating to the reasonable explanation requirement. Thus, for example, its language directly led the court of appeals—in the above-cited *T.F.W.* case—to resist arguments citing the robust *Melanie L.* language given the intervening decision in *Christopher S. T.F.W.*, Appeal No. 2015AP2603-FT, ¶ 15. (App. 51). The same pattern is demonstrated not only in the footnotes of this case, but also in yet another recent unpublished medication appeal—*Winnebago County v. P.D.G.*

("PDG II"), Appeal No. 2022AP2005, unpublished slip op., (Wis. Ct. App. August 16, 2023).[6] (App. 104).

Accordingly, given the uncertainty that exists in lower courts as to what testimony is necessary to satisfy the statutory "explanation" requirement, this Court should accept review.

II. This Court should accept review to determine whether it intends lower courts to approve findings of incompetency to refuse medication based on the "conclusory" testimony of examining doctors.

As this Court acknowledged in *Melanie L.*, the forcible administration of antipsychotic medication has significant due process implications. *Melanie L.*, ¶¶ 42-43. It is only once the County proves that the refusing patient is "incompetent" to exercise a right of refusal that state actors are therefore permitted to override the patient's otherwise constitutionally protected right of refusal. *Id.*[7]

The statute provides two pathways for the forcible administration of medication. However, given

[6] If P.D.G. petitions for review, it will mean that this Court will be confronted with two petitions raising identical issues and that circumstance counsels heavily in favor of granting review.

[7] This discussion assumes, of course, that the person is otherwise dangerous. *Winnebago County v. C.S.*, 2020 WI 33, ¶ 44, 391 Wis. 2d 35, 940 N.W.2d 875.

the significant liberty interests at stake, this Court has been quite clear that these hurdles are not meant to be easily cleared. Thus, under §51.61(1)(g)4.a, the Court has instructed lower courts to assess five exacting fact-based considerations. *Virgil D.*, 189 Wis. 2d at 15. And, even under the second standard—requiring proof that the person is incapable of "applying an understanding," the County must do more than just cite the person's refusal or their disagreement with treating physicians. *Id.* at 15-16. Instead, the County must elicit sufficient proof that the person cannot "make a connection between an expressed understanding of the benefits and risks of medication and the person's own mental illness." *Melanie L.*, 2013 WI 67, ¶ 71.

Despite the robust nature of the statutory requirements as interpreted by this Court, the court of appeals in this case appears to have seriously departed from those standards when it affirmed based on largely irrelevant and improper factual considerations, such as Darren's past refusal of medication, his disagreement with his doctor's opinion or prior violent behavior. *D.E.W.*, Appeal No. 2023AP215, ¶ 19. (App. 13).

More problematically—and more relevant for the purposes of this petition—the court of appeals did not believe it was required to apply much in the way of judicial scrutiny when assessing these claims. Instead, it cited to this Court's decision in *Christopher S.* as approving "conclusory" testimony so long as that testimony parroted the applicable statutory standard.

Id., ¶ 17. (App. 12). And, even though it conceded that more detail would have been "helpful," it specifically cited to *Christopher S.* for the proposition that requiring more of the doctor wishing to involuntary administer potentially life-altering medications to Darren was simply "not required."[8] *Id*. (App. 12).

Most egregiously, rather than applying a *de novo* standard to determine whether the County presented sufficient evidence to overcome an extremely significant constitutional right, the court of appeals effectively hand-waved Darren's arguments by explaining that any gaps in the record were irrelevant so long as the circuit court made an equally conclusory finding that the testifying doctor was "credible." *Id*., ¶ 20. (App. 14).

Review is therefore warranted, not only to correct this mistaken reading of the law—a reading seemingly guaranteed to result in perfunctory hearings wholly incompatible with the liberties allegedly protected by the state and federal constitution—but also to clarify whether, as the court

[8] In this sense, the decision of the court of appeals is consistent with a new trend in mental health appeals, whereby the court of appeals upholds a challenged order but then, in seeming dicta, offers aspirational statements meant to encourage lower courts to effectively "do better next time." *See Winnebago County Dep't of Human Servs. v. L.J.F.G.*, Appeal No. 2022AP1589, ¶ 16, unpublished slip op., (Wis. Ct. App. April 12, 2023), (App. 88); *Racine County v. P.J.L.*, Appeal No. 2023AP254, ¶ 20, unpublished slip op., (Wis. Ct. App. July 19, 2023), (App. 78).

of appeals held, this is what the Court intended when it affirmed in *Christopher S.*

CONCLUSION

For the reasons set forth herein, Darren asks this Court to accept review and reverse.

Dated this 24th day of August, 2023.

Respectfully submitted,

Electronically signed by Christopher P. August

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 4,085~~5~~3 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 24th day of August, 2023.

Signed:
Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender