STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP1263

In the matter of the mental commitment of C.J.A.,
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

C.J.H,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Should this Court grant review to clarify what evidence the county must present to prove an individual is incompetent to refuse medications under Wis. Stat. § 51.61(1)(g)4.b?

Neither the circuit court nor court of appeals directly addressed this issue. Both courts did conclude, however, that the examining doctor's testimony here was sufficient to find Carly[1] incompetent to refuse medications under Wis. Stat. § 51.61(1)(g)4.b.

2. Should this Court grant review to determine whether hearsay contained in an expert examiner's report can be admitted and relied upon in involuntary commitment proceedings?

The court of appeals affirmed the trial court's decision to admit the entirety of the examining doctor's report because it outlined the bases for the doctor's opinions.

[1] To promote readability, C.J.H. will be referred to as a pseudonym, "Carly," pursuant to Wis. Stat. § 809.19(1)(g).

CRITERIA FOR REVIEW

Review is necessary in this case because both issues presented meet several of the criteria enumerated in Wis. Stat. § 809.62(1r). The first issue petitions this Court to clarify what the county must prove when it alleges an individual is incompetent to refuse medications under Wis. Stat. § 51.61(1)(g)4.b. This Court in *Melanie L.* held that at involuntary medication hearings the county must demonstrate that the individual was provided with a reasonable explanation of the "particular drug" that is being prescribed. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶67, 349 Wis. 2d 148, 833 N.W.2d 607. Once this explanation is proven, counties must then prove the person is substantially incapable of applying an understanding of a "particular medication" in order to be found incompetent to refuse medications under Wis. Stat. § 51.61(1)(g)4.b; *Melanie L.*, 2013 WI 67, ¶ 94.

Despite the directives in *Melanie L.*, lower courts have struggled to discern the particularity required to find an individual incompetent under § 51.61(1)(g)4.b. To give one relevant example, courts often issue medication orders under this subsection once the examining doctor testifies that the individual is incompetent to refuse "medications" broadly. *See Winnebago County v. C.J.H.*, No. 2023ME17, unpublished slip op. (WI App. March 6, 2024), ¶19. (App. 11-12). This Court should accept review to determine whether § 51.61(1)(g)4. and *Melanie L.* requires more – must the county provide specific and

detailed evidence in order to prove the individual is incompetent to refuse medications under § 51.61(1)(g)4.b.

This presents a "real and significant question of federal or state constitutional law" under Wis. Stat. § 51.61(1)(g)4.b., as it asks what the county must prove to overcome a person's constitutionally protected right to refuse medication. Wis. Stat. § 809.62(1r)(a); *Melanie L.*, 2013 WI 67, ¶43. This issue also satisfies the Wis. Stat. § 809.62(1r)(c)2. criteria because it will have an immediate impact on Chapter 51 involuntary medication cases across the state.

The second issue petitions this Court to determine whether hearsay contained in an examiner's report can be admitted and relied upon in involuntary commitment or medication proceedings. This issue also meets the criteria under Wis. Stat. § 809.62(1r)(a) because it asks this Court to clarify what evidence a county is permitted to use to overcome an individual's due process rights. *See* Wis. Stat. § 51.20(5)(a); *Addington v. Texas*, 441 U.S. 418, 433 (1979); *Melanie L.*, 2013 WI 67, ¶43. Resolving how expert examiner's reports can be admitted and considered at commitment hearings will also have an obvious and immediate impact for the thousands of individuals who are subject to involuntary commitment proceedings each year. *See* Wis. Stat. § 51.20(5)(c)(2).

STATEMENT OF FACTS

On January 13, 2023, Carly was being held at the Winnebago County Jail. While there, the county filed a statement of emergency detention after Carly began "exhibiting behavior that cause[d] a danger to herself and the jail staff." (1).

Prior to the commitment hearing, Dr. Marshall Bales submitted an examination report. (17; 20). Bales stated in his report that he believed Carly was dangerous. To support his opinion, Bales described incidents involving Carly that had allegedly occurred at the Winnebago County Jail. (17:1, 3).

At the commitment hearing, Bales testified that he believed, based on a review of Carly's records and a "15 to 20 minute" examination, that Carly was manic and psychotic. (62:5-6; App. 25-26). When asked why he found Carly dangerous in his examination report, Bales referenced incidents and "problems within the jail" that were described in "records from the jail report." (62:7-8; App. 27-28). Bales noted that he only learned of these incidents through the "jail report." (62:8; App. 28). None of these records were offered or admitted into evidence.

Bales then testified that he believed Carly was a proper subject for treatment. (62:9-10; App. 29-30). Bales also opined that Carly "could neither express nor apply my attempt at reviewing medications with her." (62:10-11; App. 30-31). When asked if he believed Carly was incompetent to refuse "medication," Bales responded "incompetent." (62:11; App. 31). Bales

stated he had explained to Carly the advantages, disadvantages, and alternatives to accepting "medication." (62:11; App. 31).

After Bales' testimony, the county moved to admit his examination report into evidence. Carly objected to the report's admission, stating there were "multiple levels of hearsay within the report of the examination." (62:17; App. 37). The circuit court overruled the objection and admitted the entirety of Bales' report. (62:17; App. 37).

Shortly thereafter, Carly testified to her medication and treatment history. Carly stated she had previously worked with a psychiatrist, Dr. Shopbell, but that she now met with a counselor after Shopbell left her clinic. (62:30; App. 50). Carly also stated that her medications were previously prescribed by Shopbell, but that these medications were now being prescribed by her internist since Shopbell's departure. (62:30; App. 50). Carly testified that she has always taken her medications. (62:31; App. 51).

When asked about her medications, Carly stated she takes "trazadone for sleeping at night, and I take venlafaxine, which is a mood stabilizer, and I have medication for seizures, blood pressure medication." (62:31; App. 51). When asked if these medications had any side effects, Carly responded "No. In fact, they don't work. They don't put me to sleep." (62:31; App. 51).

After arguments from the parties, the circuit court found Carly suffered from a mental illness and was a proper subject for treatment. (62:41-42; App. 61-62). The court also found that the elements of dangerousness had been met. (62:42-43; App. 62-63). Finally, the court ruled that "a medication order is appropriate" because there was medical testimony "to support that the elements of the statute [had] been met." (62:43; App. 63).

The trial court later entered an order of commitment finding Carly dangerous under Wis. Stat. § 51.20(1)(a)2.a. (42:1; App. 18-19). The court also entered an order of involuntary medication, where it found Carly was substantially incapable of applying an understanding of her medications in order to make an informed choice as to whether to accept or refuse medication. (41:1; App. 20); *see* Wis. Stat. § 51.61(1)(g)4.b.

On appeal, Carly raised three issues challenging her commitment and involuntary medication orders. First, Carly argued the circuit court erroneously admitted Bales' report given it was littered with inadmissible hearsay. Second, Carly asserted that, absent Bales' report, the county provided insufficient evidence of dangerousness to involuntarily commit her. Finally, Carly argued the county also failed to prove she was incompetent to refuse medications under Wis. Stat. § 51.61(1)(g)4.b.

The court of appeals upheld Carly's commitment and involuntary medication orders. On the hearsay

issue, the court of appeals found that "it is good practice for circuit courts to admit the examination report" given that the report "outlines to the circuit court not only the expert's opinions but what formed the basis for those opinions." *Winnebago County v. C.J.H.*, No. 2023ME17, unpublished slip op. (WI App. March 6, 2024), ¶19 (App. 11-12). Therefore, the court reasoned, Bales's report was properly admitted in its entirety, even if the underlying hearsay in the report could be objected to with respect to the dangerousness standard. *Id.* at ¶19. The court did not explain how Carly could object to the underlying hearsay given the trial court admitted the entire report.

After upholding the admission of Bales's report, the court of appeals found sufficient evidence to find Carly dangerous. *Id.* at ¶25. Regarding the medication order, the court of appeals found the lower court's finding that Carly "was incompetent to refuse medications" was not clearly erroneous. *Id.* at ¶28-29. In particular, the court of appeals noted that Bales testified "why he believed she was not capable of expressing an understanding of the advantages, disadvantages, and alternatives to medication." *Id.* at ¶27.

ARGUMENT

I. This Court should accept review to determine the specificity with which the county must prove an individual is incompetent to refuse particular medications or treatment under Wis. Stat. § 51.61(1)(g)4.b.

"The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 221 (1990). Given the individual's substantial liberty interest, involuntary medication proceedings "cannot be perfunctory under the law. Attention to detail is important." *Melanie L.*, 2013 WI 67, ¶ 94.

In *Melanie L.*, this Court held that § 51.61(1)(g)4 requires counties to show that a doctor provided a "reasonable explanation" of the advantages, disadvantages, and alternatives to a "particular drug" in order to issue an involuntary medication order. *Melanie L.*, 2013 WI 67, ¶ 67, 349 Wis. 2d 148, 833 N.W.2d 607. Similarly, *Melanie L.* also held that § 51.61(1)(g) 4.b. requires the county to "prove that the person is substantially incapable of applying an understanding of the advantages and disadvantages of *particular* medication to her own mental illness." *Melanie L.*, 2013 WI 67, ¶ 94, 349 Wis. 2d 148, 833 N.W.2d 607 (emphasis added). Thus, it would appear *Melanie L.* prevents courts from issuing an involuntary medication order under § 51.61(1)(g)4.b.

unless the county proves that (1) the doctor provided a reasonable explanation to the individual about the *particular* medications at issue and (2) the individual is substantially incapable of applying an understanding of these *particular* medications to his or her own mental illness.

Despite *Melanie L.*'s directive, counties in medication hearings often only elicit broad, generic testimony about the explanation given and the person's ability to apply an understanding to medications. *See, e.g., Winnebago County v. D.E.W.*, No. 2023AP215, ¶¶ 5-8, unpublished slip op. (Wis. Ct. App. July 26, 2023) (App. 110-112). [2] Bales's testimony in this case is representative of common practice:

> Q: Are you asking for authorization to involuntarily medicate [Carly] with psychotropic medication?
>
> A: Yes.
>
> Q: Do you believe that [it] would have a therapeutic value for her?
>
> A: Yes.
>
> Q: What sort of medication would you be seeking? And if you could give one example of its benefits.
>
> A: Basically a mood stabilizing medication. ... And now, there's many, and I reviewed this with her…

[2] All of the unpublished, authored opinions are cited in this brief for their persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

> But she could neither express nor apply my attempt at reviewing medications with her when I met with her. ....
>
> Q: Do you believe she's competent or incompetent to refuse medication?
>
> A: Incompetent.
>
> Q: Were the advantages, disadvantages, and alternatives of accepting medication explained to [Carly]?
>
> A: Yes. By me…
>
> Q: And what, if any, alternatives were discussed with [Carly]?
>
> A: … I said there's no good alternatives. Yes, therapy, anger management, case management."

(62:10-11; App. 30-31).

Bales's testimony does not specify whether Carly is able to apply an understanding to any of the six individual medications she was taking at the time of Bales's examination. (17:2). Instead, Bales only testified that Carly is "incompetent" to refuse "medication" generally. (62:10; App. 30). Similarly, Bales does not clarify whether he made a reasonable explanation about any one of the particular medications that Carly was taking. Instead, he only testified that he listed the advantages, disadvantages, and alternatives to "medication" before stating "there's no good alternatives." (62:11; App. 31).

This Court should accept review to determine if this common, generic testimony – which lacks any detail about the particular medications at issue – provides sufficient evidence for courts to find an individual incompetent to refuse "particular drugs" under § 51.61(1)(g)4.b. *See Melanie L.*, 2013 WI 67, ¶ 67, 94.

The arsenal of drugs that could be forcibly administered under a single involuntary medication order should encourage this Court to determine whether more specific testimony is required. The National Institute of Health recognizes dozens of different types of medications that could be involuntarily administered, including various types of antidepressants, anxiolytics, mood stabilizers, hypnotics, and other psychotropic medications.[3] Each of these medications address a wide range of mental health ailments, vary in potency, and come with a broad spectrum of unique side effects. In Carly's case, for example, the examination report listed six different types of medications that Carly was currently taking, ranging from common antihistamines to high potency psychotropics. (17:2).

The diverse list of medications that could be involuntarily administered means the "reasonable explanation" that must be provided varies depending

[3] *See generally* Charles DeBattista & Alan F. Schatzberg, The Black Book of Psychotropic Dosing and Monitoring, 51(1) PSYCHOPHARMACOLOGY BULL. 8 (2021) (available online at https://www.ncbi.nlm.nih.gov/pmc/articles /PMC8063126/).

on the particular drugs at issue. The variety of available drugs also means an individual's ability to apply an understanding of a particular medication to their own mental illness could vary depending on the type of medication. Despite these complexities, doctors often only provide generic testimony that does not address the specifics of the explanations given or the ability of individuals to apply an understanding of particular medications to his or her own mental illness. This Court should grant review to determine if counties must "more carefully articulate its case" in order to provide sufficient evidence for an involuntary medication order under § 51.61(1)(g)4.b. *Melanie L.*, 2013 WI 67, ¶95.

II. This Court should accept review to determine whether hearsay contained in an expert's report can be admitted and for what purposes.

This Court should also accept review to clarify the admissibility and use of an expert examiner's report that contains inadmissible hearsay. Hearsay is any out of court statement offered to prove the truth of the matter asserted. Wis. Stat. § 908.01(3). Hearsay is inadmissible at an involuntary commitment hearing unless an exception applies. *See* Wis. Stat. § 908.02; *Matter of S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 327-28, 457 N.W.2d 326, (Ct. App. 1990). However, an expert witness during a commitment hearing can, consistent with the rules of evidence, provide an opinion they formed based on inadmissible hearsay.

See S.Y. v. Eau Claire County, 156 Wis. 2d 317, 327, 457 N.W.2d 326 (Ct. App. 1990); Wis. Stat. § 907.03.

Although the expert's opinion relying on hearsay is admissible, "the underlying evidence is still inadmissible." *See S.Y.*, 156 Wis. 2d at 328 (citing § 907.03); *see also State v. Watson*, 227 Wis.2d 167, 198, 595 N.W.2d 403 (1999) (court finds the expert's opinion "doesn't transform the hearsay into admissible evidence"). Applying *S.Y.*, appellate courts have routinely found that expert testimony about underlying allegations or events are inadmissible for the truth of the matter asserted, even if the expert relied on these allegations or events to form their opinions or diagnoses. *See, e.g., Waupaca County v. G.T.H.*, 2023 WI App 50, ¶36, 996 N.W.2d 416 (unpublished) (App. 81); *Winnebago County v. D.E.S.*, 2023 WI App 54, 997 N.W.2d 413 (unpublished) (App. 87-107).

While lower courts routinely find that expert testimony cannot be a "conduit for inadmissible hearsay," there is confusion on whether identical principles apply to hearsay contained within the expert examiner's report. *State v. Coogan*, 154 Wis. 2d 387, 399, 453 N.W.2d 186 (Ct. App. 1990). Courts have often, including in this case, admitted examiner's reports in their entirety, despite hearsay objections, because the "report[s] outline to the circuit court not only the expert's opinion but what formed the basis for those opinions." *See Winnebago County v. C.J.H.*, No. 2023ME17, unpublished slip op. (WI App. March 6,

2024), ¶19 (App. 11-12).[4] But while examination reports do often contain an expert's opinions and findings, which are not hearsay, they often also contain inadmissible hearsay drawn from other, independent sources. Therefore, when admitted in its entirety, the examiner's report often becomes a conduit for admitting inadmissible hearsay. *See Coogan*, 154 Wis. 2d at 399. In this case, for example, the trial court's decision to admit the entirety of Bales's report resulted in the court being able to consider a deluge of otherwise inadmissible hearsay. *See* (17:1-3). Once the report is admitted in its entirety, it often becomes unclear whether lower courts are relying on these hearsay statements and for what purposes.

This Court should accept review to determine whether lower courts can admit hearsay contained within an examiner's report. This Court should also clarify how lower courts may use or rely on hearsay contained in an examiner's report without violating the individual's due process rights. Wis. Stat. §§ 908.02 and 908.03; *Lessard v. Schmidt*, 349 F.Supp. 1078, 1103 (E.D. Wis. 1972).

[4] Further blurring the admissibility of hearsay in an examiner's report is the court of appeals' decision in *L.X.D.-O*, which held that, in initial commitment proceedings, an examiner's report need not be admitted into evidence in order to be considered by the circuit court. *Outagamie County v. L.X.D.-O.*, 2023 WI App 17, ¶34, 407 Wis. 2d 441, 991 N.W.2d 518. This issue does not apply to Carly's case given Bales' report was moved into evidence by the county before being admitted over Carly's hearsay objection. (62:17; App. 37).

CONCLUSION

For the reasons stated above, Carly respectfully requests that this Court grant her petition for review.

Dated this 2nd day of April, 2024.

Respectfully submitted,

Electronically signed by Katie R. York
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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 2,936 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 2nd day of April, 2024.

Signed:
Electronically signed by
Katie R. York
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Acting State Public Defender