STATE OF WISCONSIN

IN SUPREME COURT

Case Number: 2023AP1283

In the matter of the Mental Commitment of T.M.G.:

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

T.M.G.,

Respondent-Appellant-Petitioner

On Appeal from Orders for Extension of Commitment and Involuntary Medication and Treatment Entered in Winnebago County Circuit Court, The Honorable Michael S. Gibbs, Presiding

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COUNTY'S RESPONSE IN OPPOSITION TO THE PETITION FOR REVIEW

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INTRODUCTION

This Court should deny Thomas's petition for review because this Court's primary function is to clarify or interpret the law. This Court's primary function is not to address constitutional issues forfeited at the trial level. "Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented." Wis. Stat. § 809.62(1r). No such reasons have been presented by Thomas. Nor have the statutory criteria been met. Thomas's petition should be denied for the following three reasons.

REASONS THE PETITION SHOULD BE DENIED

I. Thomas does not present a novel question when it is well settled that threats of violent behavior and serious physical harm to others are sufficient to establish dangerousness under the second standard.

At trial, the County presented evidence of two instances of dangerousness to others under Wis. Stat. 51.20(1)(a)2.b.. First, Thomas threw human feces and urine at a Department of Corrections employee. This evidence came in through Dr. George Monese, who testified that Thomas admitted this heinous conduct to him. (R29:13). Second, he sent a letter containing a white, powdery substance to a federal courthouse. Dr. Monese testified that Thomas also admitted this dangerous behavior. (R29:15). A Deputy U.S. Marshal testified that she investigated the allegation that Thomas sent a threatening letter containing a white, powdery substance

addressed to the "U.S. courthouse" and listed Thomas' full name and address on the envelope. (R29:32-34). The Deputy testified that she believed the sending of this envelope to the courthouse was threatening. (R29:37).

At trial, the court learned that Thomas had a history of making threats to judges, as evidenced by at least six charges for such felony conduct in violation of Wis. Stats. §§ 940.203, 939.50. (R29:13). In its findings, the trial court observed that sending a letter containing a "white powder" to a federal courthouse is "certainly a threat by today's standards." On appeal, Thomas did not argue this finding was clearly erroneous and argued instead that as a matter of law, such behavior did not meet the second standard of dangerousness.

The court of appeals dismissed Thomas's "novel" argument as irrelevant. *Winnebago County v. T.M.G.*, No. 2023AP1283, unpublished slip op., ¶14 (WI App January 24, 2024). The court correctly observed that what is relevant to Wis. Stat. § 51.20(1)(a)2.b. "is whether Thomas *threatened* 'violent behavior and serious physical harm.' *See D.K.,* 390 Wis. 2d 50, ¶¶ 47-49 (holding that a subject individual's 'homicidal thoughts' and 'threats to the police department' ─ which are not violent behavior per se ─ were sufficient to establish dangerousness under the second standard)."[1] *Id.*

[1] *Marathon County v. D.K.*, 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901.

The court of appeals put it best when it observed that, "Obviously, there is a threat inherent in sending an envelope containing an unidentified white powder. People would reasonably fear the substance to be a harmful agent, such as anthrax, that could cause physical harm and even death. Powdered anthrax spores have been mailed through the U.S. postal system and caused fatalities in the past." *Id.,* ¶14, ftnt 7 (citation omitted).

The court of appeals applied the proper standard of review and decided this issue correctly. Alternatively, there was other admissible and credible evidence of Thomas's dangerousness, particularly his admission of throwing urine and feces at a corrections officer. From this admission, the reviewing court could reasonably infer the trial court relied on it when it found Thomas dangerous under the second standard. As observed by the court of appeals, Thomas raises an irrelevant, not a novel, question concerning the second standard and it, therefore, it does not meet this court's criteria to review pursuant to Wis. Stat. § 809.62(1r)(a).

II. Thomas does not convince this Court in his petition that *Christopher S.*[2] and *D.K.* are ripe for reexamination in the context of Thomas's involuntary medication order, or that the holding in *Langlade County v. D.J.W.*[3] should be applied to involuntary medication orders.

This is a sufficiency of the evidence case. This Court ordinarily does not favor accepting such issues for review.

[2] *In re the Mental Commitment of Christopher S.*, 2016 WI 1, 366 Wis.2d 1, 878 N.W.2d 109.
[3] *Langlade County v. D.J.W.,* 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277.

This case does not present any unique reason for this Court to veer from this regular practice. Thomas does not argue that any factual findings are clearly erroneous and limits his challenge to the court's application of the facts to the law. As a matter of law, the trial court and the court of appeals got it right. The record was sufficient and Thomas does not adequately explain why the criteria in Wis. Stat. § 809.62(1r)(e) apply here.

As observed by the court of appeals, the expert provided examples of the advantages, disadvantages and alternatives to the particular medication, Invega, that he recommended Thomas take to control his dangerous behaviors caused by his schizoaffective disorder. ¶*D.S.,* ¶15. He testified that Thomas could not express an understanding of the explanation provided to him. He also testified that Thomas is "unable to understand that he has a mental illness[,] … [a] very severe, chronic mental illness[] that needs treatment." The circuit court found:

> There has been testimony that [Thomas] is unable to understand the advantages, disadvantages, and alternatives for the particular medication or treatment has been explained to him. He was unable to apply an understanding to his condition. He doesn't believe that he has any mental illness.
>
> He testified extensively as to how people are trying to force things on him, trying to kill him. I think certainly exhibiting such behavior, that indicates that he is unable to adequately apply an understanding of his treatment to his condition, though he has improved over the years.
> …
>
> His dangerousness can be controlled by psychotropic medication. It can be administered to him.

The court of appeals properly applied *Christopher S.* to conclude that, as a matter of law, the court did not err. Thomas stipulates that the facts were not clearly erroneous. Contrary to Thomas's argument, Dr. Monese's testimony was sufficient to prove by clear and convincing evidence that Thomas is incompetent to refuse medication and treatment. The expert's testimony can be directly linked to the requirements for an involuntary medication order. Like the doctor in *Christopher S.*, his testimony closely tracked the statutory standard and helped the County meet its burden of proof. *See Christopher S.*, ¶54. ("Because these statements mirrored the statutory standard, they met the statutory standard. Thus, the circuit court did not err when it concluded that the County proved by clear and convincing evidence that Christopher was incompetent to refuse psychotropic medication and treatment as required by Wis. Stat. § 51.61(1)(g)4.b.").

This Court should not take this case as an opportunity to limit or overturn *Christopher S.*. Its sufficiency of the evidence holding was grounded in the record and is consistent with *Melanie L*. At the time, the question was not a close one in the eyes of the court; five justices joined the majority decision and two justices concurred. *Christopher S.* was decided in 2016, only 8 years ago, and *D.K*. only 4 years ago. As explained above, *D.K*. provided important insights into the second standard of dangerousness and its holding is directly applicable to Thomas's case. The court of appeals properly applied the

facts of this case to *D.K.*'s precedent. Thomas does not explain how the passage of time or intervening circumstances justify this Court revisiting recent precedent.

Courts are already obligated to make findings of fact and conclusions of law in all civil cases, including petitions to involuntarily medicate. Wis. Stat. § 805.17(2). The court in *D.J.W.* examined an appeal from a recommitment order, not a medication order. In *D.J.W.*, the court reviewed a case where it was not clear what standard of dangerousness applied to *D.J.W.* at the trial level. Similarly, in *Melanie L.* it was not clear what legal standard the doctor was applying. By contrast, no such confusion exists in this case. Therefore, unlike *D.J.W.,* there is no demonstrable need in this case, under these facts, for this Court to create another directive to the court that is already codified in Wis. Stat. § 805.17(2).

Just like the testimony in *Christopher S.*, the credible expert's testimony in this case mirrored the statutory standard, so it met the standard. While the trial court may not have applied all the facts found to the law, it applied some facts. The circuit court believed the County met its burden to prove Thomas was incompetent and gave reasons to support its conclusion. His written orders also reflect this belief. (R17,18). This case fits squarely within *Christopher S.* and *Melanie L.*, and Thomas has not demonstrated that a directive similar to the one imposed in *D.J.W.* should be applied to his case.

III. Thomas fails to explain to this Court how his case presents a *real* and *significant* question of federal or state constitutional law when he does not identify what constitution he invokes in the single paragraph devoted to this issue.

First, appellate courts will only consider constitutional issues raised for the first time on appeal if it is the best interest of justice to do so, if both parties have had an opportunity to brief the issue, and if there are no factual issues that must be resolved. *See, e.g., L.K. v. B.B. (In the Int. of Baby Girl K)*, 113 Wis.2d 429, 448, 335 N.W.2d (1983). *But see State v. Marshall*, 113 Wis. 2d 643, 653-54, 335 N.W.2d 615 (1983). Thomas does not address any of these criteria to justify this Court's consideration of a new issue on appeal.

Every court case involves constitutional issues on a general level, and this case is no exception. However, Thomas failed to raise a specific constitutional issue below and the court, therefore, did not make any findings related to a constitutional issue. The County did not have the opportunity to respond, and the court of appeals was not presented with a constitutional issue to decide. Therefore, there is no decision for this Court to review.

Second, Thomas invokes the "Due Process Clause" on page 20 of his petition. He cites some cases that presumably invoke the same, however, he never applies the constitution nor the cited cases to his case in any specific way. His petition contains general constitutional statements that apply to all involuntary medication

hearings. He does not frame nor state what the issue actually is. He does not even specify what constitution he relies on. Because no real constitutional issue is raised in his petition, it does not meet this Court's criteria pursuant to Wis. Stat. § 809.62(1r)(a).

CONCLUSION

This Court should deny the petition for review.

Dated and electronically filed this 6th day of March, 2024.

Respectfully submitted,

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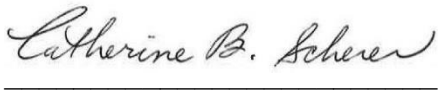
CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms with the Rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c). The length of the brief is 1,793 words.

Dated this 6th day of March, 2024.

Signed,



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