STATE OF WISCONSIN

IN SUPREME COURT

Case Number: 2023AP1484

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*In the matter of the Mental Commitment of D.S.:*

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

D.S.,

Respondent-Appellant-Petitioner

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On Appeal from an Order for Extension of Commitment and 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

In this Chapter 51 recommitment case, the circuit court found that the County met its burden to prove that Dennis[1] was mentally ill, a proper subject for treatment and dangerous. (R118). The circuit court believed the County proved dangerousness pursuant to Wis. Stats. §§ 51.20(1)2.e. and (1)(am). *Id.* The court also entered an involuntary medication order, however, Dennis did not appeal from that order. (R119). As alleged, testified to and argued, the expert's unchallenged testimony and report proved that Dennis was dangerous because there was a substantial likelihood, based on Dennis's treatment record, that Dennis would become dangerous under the fifth standard if treatment was withdrawn. *See* Wis. Stats. §§ 51.20(1)(a)2.e. and (1)(am).

At the conclusion of the trial, the court made a thorough record that supported every element of the dangerousness standards alleged. He found the expert to be credible. He stated the standards explicitly. In his findings, he summarized the facts that demonstrated Dennis's condition fit squarely within the recommitment and fifth standards. His decision complies with the recent directive in *Langlade County v. D.J.W.* that circuit courts should "make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on

[1] To be consistent with the court of appeals decision and to maintain confidentiality, the County refers to D.S. as "Dennis" in its response.

which the commitment is based." *D.J.W.*, 2020 WI 41, ¶3, 391 Wis. 2d 231, 942 N.W.2d 277.

In a straightforward decision, the court of appeals agreed that the *D.J.W.* directive was met and that there was sufficient evidence of dangerousness. *Winnebago County v. D.S.,* No. 2023AP1484, unpublished slip op., (WI App January 24, 2024).

This Court should deny the petition for review for three reasons. First, the court of appeals correctly applied the standard of review to Dennis's sufficiency of the evidence claim and determined that, as a matter of law, the court's fact-based decision regarding dangerousness complied with *D.J.W.*. Second, this case will be moot after April 17, 2024, and Dennis has not explained how an exception to the mootness doctrine applies. Third, since Wis. Stat. § 51.20(13)(e) controls the burden of proof applied in Chapter 51 recommitment cases, Dennis's argument that the credible and unchallenged facts in this case do not prove by clear, satisfactory and convincing evidence that he is dangerous is best made to the legislature, not to this Court.

## REASONS THE PETITION SHOULD BE DENIED

This Court's primary function is to clarify or interpret the law, not review facts, issues forfeited at trial or discretionary acts of the court. "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 in Dennis's petition. Nor have the statutory criteria in section 809.62(1r) been met. Dennis's petition should be denied for three reasons.

I. The court of appeals correctly held that the circuit court complied with the *D.J.W.* directive and there was sufficient evidence of dangerousness.

The decision of the court of appeals is not in conflict with the supreme court's decision in *D.J.W.* and, therefore, it does not meet the single criterion Dennis identifies for granting review. *See* Wis. Stat. § 809.62(1r)(d). In its decision, the court of appeals correctly recited the court's directive to trial courts in *D.J.W.* "to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2., on which the commitment is based." *D.S.*, ¶16 (citing to *D.J.W.*, ¶3). It accurately cited the purpose of the court's holding in *D.J.W.*, which was twofold: "First, it provides clarity and extra protection to patients regarding the underlying basis for a recommitment." *D.J.W.*, ¶42. "Second, a requirement of specific factual findings with reference to a subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. will clarify issues raised on appeal of recommitment orders and ensure the soundness of judicial decision making, specifically with regard to challenges based on the sufficiency of the evidence." *D.J.W.,* ¶44.

The court of appeals found that the "purposes of the 'specific factual findings' requirement were met here." *D.S.,* ¶17. It agreed "with the County that the record is

clear as to which standard of dangerousness the circuit court applied in this case. [The expert's] testimony and report invoked the fifth standard, the parties tailored their arguments to that standard, and the court focused on the fifth standard in its oral ruling." *Id.* Unlike the case presented in *D.J.W.,* no guesswork is required when reviewing the record. *See D.J.W.*, ¶45 ("In the future, such guesswork will be avoided by our newly instituted requirement for specific factual findings with reference to a subdivision paragraph of § 51.20(1)(a)2.")

The court of appeals concluded that Dennis's argument that the circuit court's findings on several elements of the fifth standard were clearly erroneous lacked merit. *Id.,* ¶ 19. It observed that Dennis's appellate arguments about the record mischaracterized evidentiary rulings, recency requirements, and the trial court's findings. *Id.,* ¶¶19-21.

The court of appeals found that the circuit court complied with *D.J.W.* for several reasons. First, in its decision, the circuit court recited every element of the recommitment and the fifth standard of dangerousness. However, "the circuit court did more than simply 'parrot[] the statutory language.' *See S.H.*, 3939 Wis.2d 511, ¶17." Id., ¶25 (citing to *Winnebago County v. S.H.*, 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761). The circuit court stated expressly that he found the expert to be credible. *Id.* Then, "the court discussed the crux of the evidence that, in its view, established dangerousness". *Id.* The circuit court summarized Dennis's treatment history

and his admission of acting on delusional beliefs that he owned neighbors' homes and would enter them at great risk to himself and others. *Id.* Importantly, the court of appeals observed:

> Though the circuit court did not specifically refer to these facts each time it found one of the elements of the fifth standard, its discussion of the behavior Dennis repeatedly engaged in on prior occasions when he stopped taking medication, along with Dennis's repeated assertions that he will not continue taking medication voluntarily, laid a sufficient factual predicate to establish the elements of dangerousness under the fifth standard.

*Id.*, ¶ 28.

The court of appeals decision is consistent with the *D.J.W.* directive. The trial court provided this Court, the court of appeals and the litigants with notice of what dangerousness standards it relied on and its reasons for doing so. *See Sauk County. v. S.A.M.*, 2022 WI 46, ¶36, 402 Wis. 2d 379, 975 N.W.2d 162 (where the court recognized that even "[t]hough no witness recited the Third [dangerousness] Standard with exactness," the record showed "the circuit court, parties, and witnesses [were] all in accord regarding the statutory standards they were applying"). Unlike *D.J.W.,* everyone in Dennis's case had notice of the dangerousness alleged. Unlike *D.J.W.,* the circuit court was specific about what dangerousness standards were proven and why.

In its written form, the fifth standard is long and complex. However, the essence of the fifth standard "addresses dangerousness arising from an inability to

understand the advantages and disadvantages of a particular medication or treatment." *Dane County v. Kelly M.*, 2011 WI App 69, ¶8, 333 Wis. 2d 719, 798 N.W.2d 697. The details in the factual findings in this case reveal that the trial court recognized that Dennis's condition represented a classic fifth standard case. The goals of the *D.J.W.* directive were met here and it cannot be credibly argued that the decisions of the trial and appellate courts are in conflict with *D.J.W.*. Therefore, the single criterion identified by Dennis in his petition has not been satisfied pursuant to Wis. Stat. § 809.62(1r)(d).

Lastly, Dennis unsuccessfully raised sufficiency of the evidence on appeal. Yet, he repeats the same arguments in his petition. This Court ordinarily does not favor accepting sufficiency of the evidence issues for review. Dennis's issue does not satisfy any of the criteria in Wis. Stat. § 809.62(1r). Dennis recognizes this on page 4 of his petition. This case does not present any unique reason for this Court to veer from this regular practice. Even if this Court grants the petition to review the alleged *D.J.W.* error, it should not review the sufficiency of the evidence holding.

The unchallenged and credible expert's testimony in this case mirrored the statutory standard. It, therefore, met the standard. While the trial court may not have applied all the facts found to the law element by element, it "discussed the crux of the evidence" that "laid a sufficient predicate to establish the elements of dangerousness under

the fifth standard." *D.S.,* ¶28. The court recognized that Dennis's condition presented a classic fifth standard of dangerousness case. The court believed the County met its burden to prove Dennis was dangerous and gave reasons to support its conclusion. His written orders also reflect this belief. (R118). Applying the proper standard of review, the court of appeals correctly held that this is sufficient evidence. *D.S.*, ¶28.

II. This case will be moot after April 17, 2024, and Dennis does not argue that an exception to the mootness doctrine applies.

The twelve-month recommitment order on appeal in this case will expire on April 17, 2024. At that time, the order will become moot. Dennis is silent about the impending mootness issue in his petition, and thereby forfeits this argument. There is no compelling reason for this Court to take jurisdiction of this almost-moot case since he also fails to convince this Court that any of the criteria to grant his petition apply.

The supreme court recently held that Chapter 51 commitments are not moot when the committee identifies collateral consequences, such as the firearms restriction and financial liability for care, that survive the expiration of the order. *See Marathon County v. D.K.,* 2020 WI 8, ¶3, 390 Wis. 2d 50, 937 N.W.2d 901, and *S.A.M.,* ¶19-20. Unlike the parties in *D.K.* and *S.A.M*., however, Dennis does not identify any ongoing collateral consequences he believes make his appeal non-moot. Therefore, the court's

recent holdings in *D.K.* and *S.A.M.* do not apply in this case.

"Mootness is a doctrine of judicial restraint." *D.K.*, ¶19. As the Appellant-Petitioner, it is Dennis's burden to 1) raise the obvious impending issue, and 2) assert to this Court that collateral consequences apply to him to establish that his issue is not moot, or explain how an exception to the mootness doctrine applies to his moot case. Dennis has failed to show this Court why his case is either not moot, or that an exception to the mootness doctrine applies.

### III. Dennis's argument that the burden of proof was not met in this case is best made to the legislature, not this Court.

On this record, Dennis's insistence that the record lacks sufficient evidence because the County did not meet its burden of proof is contrary to Wis. Stat. § 51.20(13)(e). This section requires the application of the middle burden of proof in Chapter 51 civil commitment cases. In this case, the County did everything right. It called a prepared and credible expert knowledgeable about Dennis to testify about all of the elements of the dangerousness alleged. The expert was familiar with the treatment records. During the expert's testimony, the County modeled its questions around the statutory standards and asked many clarifying questions. The expert didn't just provide yes or no answers to the thorough, direct examination by the County. He provided full answers and many examples of dangerous behavior that related to Dennis's mental illness and refusal to properly treat it.

Despite the large volume of uncontested and credible expert testimony presented at a court trial, Dennis petitions this Court, suggesting that more is required. Is it? Of course not. Here, the County did everything it was supposed to do. As recommended in *Marathon County v. D.K.*, the County "developed its medical expert's testimony, moved the expert's report into evidence, and properly provided notice of its witnesses." *Id.*, ¶ 55. As recommended by *D.K.*, the circuit court made "specific factual findings" by discussing "the behavior Dennis repeatedly engaged in on prior occasions when he stopped taking medication, along with Dennis's repeated assertions that he will not continue taking medication voluntarily", which "laid a sufficient factual predicate to establish the elements of dangerousness under the fifth standard." *D.S.,* ¶28. *See also D.K.*, ¶55 ("Also the circuit court could have made more detailed and thorough factual findings and clarified its legal conclusions.").

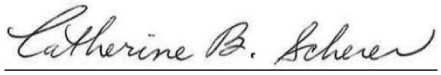
Dennis's demands for more evidence in his case appear to be a veiled attempt to raise the burden of proof in civil commitment hearings. The only higher burden of proof would be "beyond a reasonable doubt." This is contrary to section 51.20(13)(e). To effect the change Dennis really wants, he needs to ask the legislature. "Our form of government provides for one legislature, not two." *Flynn v. DOA,* 216 Wis. 2d 251, 529, 576 N.W.2d 245 (1998).

## 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 2,165 words.

Dated this 6th day of March, 2024.

Signed,

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