STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP001842

In the matter of the mental commitment of B.R.C.
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

B.R.C.,

Respondent-Appellant.

PETITION FOR REVIEW

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ISSUES PRESENTED

Brooke[1] requests review of the court of appeals' decision in *Winnebago County v. B.R.C.,* No. 2023AP1842. In this decision, the court of appeals complains about a large influx of chapter 51 appeals based on trial court violations of *D.J.W.*'s constitutional safeguard requiring them "to make specific factual findings", and it declares that "all sides could benefit from clarity on the point". This Court should grant review to provide such clarity given the important constitutional interest at stake.

Here, the trial court noted that it heard from the witnesses and it relied "heavily upon the opinion of the medical professional". It then noted that Brooke's mental illness causes "episodes of spiritually grandiose thinking and paranoid delusions". Finally, it identified that "both the A and B [dangerousness] standards" were met.

Upon review, the court of appeals recognizes that the trial court failed "to make specific factual findings" that identify an alleged act, attempt, or threat for the dangerousness standards. But, because the trial court said that the mental illness causes spiritual thinking and paranoid delusions, it proceeds to search the record for witness allegations and inferences—that the trial court never found proven—and holds that the trial court's lack of "specific factual findings" was not an erroneous exercise its discretion.

[1] To preserve confidentiality and promote readability, this brief refers to B.R.C. by the pseudonym "Brooke." *See* Wis. Stat. § 809.19(1)(g).

1. The first issue on appeal is whether the appellate court circumvents *D.J.W.*'s constitutional safeguard when it resorts to searching the record for witness allegations and inferences, which the trial court never made as "specific factual findings," because the trial court mentioned a ubiquitous mental health symptom— that it causes "episodes of spiritually grandiose thinking, [and] paranoid delusions."

The trial court failed "to make specific factual findings." Thoughts and delusions may diagnose mental illness, but they don't establish dangerousness. Dangerousness requires furtherance through an act, attempt or threat. The court of appeals' application of *D.J.W.*'s constitutional safeguard must be corrected.

Next, in *Virgil D.*, this Court held that disagreement with the examining psychiatrist does not forfeit an individual's constitutionally-protected right to refuse mind-altering, and potentially harmful, drugs. For over thirty years, this Court has recognized that an individual decides whether to consent— "even if [their] decision to refuse to take the medication is a poor choice, it is [theirs] to make as long as [they] understand the implication of that decision." *Jones v. Gerhardstein,* 141 Wis. 2d 710, 742, 416 N.W.2d 883 (1987).

Here, Brooke—a very smart, informed person—testified that she is "currently taking 10 milligrams of Abilify … once a day in the evening", which had helped her to sleep. The medication, she explained, "helps balance the neurotransmitters, serotonin, dopamine in my brain, which is supposed to help with mood, thinking, and behaviors". As for side-effects, she

testified that one reason she chose to take Abilify was because Lithium (the drug used when forced injection is required) "had 16 pages of [] side effects, Abilify, [had] four pages of pretty manageable symptoms along with potential medication in case there were side effects[.]" Brooke agreed that the current medication was helping her, and she felt "pretty healthy." (49:36). But she disagreed with the doctor's mental health diagnosis; nevertheless, she was voluntarily taking the medication "to follow the advice of medical health professionals and … the Court". (49:38-9).

The trial court ignored her vast comprehension of the medications and relied solely on her disagreement with the doctor's diagnosis to issue the involuntary medication order. The court of appeals notes "Brooke's clear elaboration about her medication". But it concludes that her disagreement with the doctor's mental illness diagnosis established "that she *may* not have been competent to express an understanding of the advantages or alternatives to treatment:" so, it affirms the trial court's order.

2. The second issue on appeal is whether an individual (who followed the doctor's medication advice and displayed a thorough comprehension of the prescribed medication, its benefits, and its side effects) forfeits their constitutional right to refuse psychotropic drugs by disagreeing with the doctor's mental illness diagnosis.

Brooke clearly understood the implication of her decision. This Court must correct the court of appeals' application of precedent.

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CRITERIA FOR REVIEW

The issues for review present real and significant questions of federal or state constitutional law. *See* Wis. Stat. §809.62(1r)(a).

The government's intrusion into a person's mental health treatment with a commitment and forced medication order result in grave deprivations of their core liberty interests protected by the Due Process clause. *See Jones v. U.S.,* 463 U.S. 354, 361 (1983); *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992); and *State v. Post,* 197 Wis. 2d 279, 302, 541 N.W.2d 115 (1995). The United States Supreme Court has "always been careful not to minimize the importance and fundamental nature of the individual's right to liberty." *Foucha,* 504 U.S., at 80 (internal citation omitted).

The Fourteenth Amendment of the United States Constitution incorporates the individual right to be free from certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990) (citing *Daniels v. Williams,* 474 U.S. 327, 331 (1986). And Article 1, §1 of the Wisconsin Constitution guarantees a secured right to liberty for all people.

To protect against diminishing an individual's core liberty interest in making their own treatment decisions, this Court clearly decreed that trial courts

must "make specific factual findings" with reference to the applicable dangerousness standard. *Langlade County v. D.J.W.,* 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277. And to protect against diminishing an individual's constitutional right to refuse unwanted drugs, this Court has made clear that an individual retains their right to refuse mind altering drugs so long as they understand the implications of doing so. *Jones,* 141 Wis. 2d at 742 (1987).

But now, the court of appeals has gutted these protections. First, the court of appeals' search of the record for witness allegations and inferences (that the trial court never *specifically* made as findings) fails to hold the trial court accountable to *D.J.W.*'s mandate; thereby greatly diminishing this Court's constitutional safeguard. This raises a constitutional question of whether such a review "mirror[s] the serious nature of the proceeding" and core liberty interests at stake.

Next, the court of appeals nullified Brooke's core liberty interest in refusing mind altering drugs even though she demonstrated that she clearly understood the implications of her decision, the type of medication prescribed, how it benefited her, and the potential side effects. It merely declares that "she *may* not have been competent to express an understanding of the advantages or alternatives to treatment" because she disagreed with the doctor's mental illness diagnosis. This raises a constitutional question of whether the government may nullify a person's liberty interest

when the person clearly understands the implication of their decision.

Next, both issues for review also are questions of law that will recur unless this Court resolves them, and it will significantly help develop, clarify, or harmonize the law regarding a novel issue that will have significant, real, and immediate statewide impact. *See* Wis. Stat. §809.62(1r)(c)2.&3.

The court of appeals infrequently publishes chapter 51 decisions due to §809.23(4)(b) and because the law is usually straightforward. *D.J.W.* presented a very clear mandate to trial courts, and this Court's precedent clearly states that individuals retain their right to refuse medications when they understand the implication of their decision. Yet as this case demonstrates, the court of appeals is applying this Court's straightforward mandates in an unclear way, resulting in uncertainty over the duties of trial courts.

Further, the court of appeals distressingly states, "[t]he extraordinary large influx of appeals in mental commitment cases is starting to overwhelm the appellate system". And it claims "that all sides could benefit from clarity[.]" In another recently issued court of appeals decision, the court of appeals asserted that "[i]t is troubling that circuit courts are still failing to comply with *D.J.W.*'s specific directive, which our supreme court announced almost four years ago in April 2020". *Manitowoc County v. B.M.T.*, No. 2022AP2079 & 2023AP904, unpublished slip op. ¶24

(WI App February 21, 2024) (albeit in regards to the applicable dangerousness subdivision).

These are real and present concerns that require clarification. Is the court of appeals correctly reading *D.J.W.*'s constitutional safeguard as allowing it to search the record for witness allegations and inferences that it considers related to ubiquitous thought and delusion symptoms when the trial court never made a single "specific factual finding" related to an alleged act, attempt or threat? Is the court of appeals correctly reading this Court's precedent that an individual's disagreement with a physician's opinion does not forfeit their liberty interest to refuse medication so long as they understand the implications of their decision? Does the court of appeals' application of this Court's precedent mirror the serious nature of the proceedings? Absent clarification, the constitutional rights of individuals are subject to unclear, disjointed interpretations and trial courts will be without the clear mandates that this Court provided in previous decisions.

STATEMENT OF CASE AND FACTS

At 31 years old, Brooke was a "pretty high functioning" young person – she was a teacher working on a master's degree in educational leadership with an emphasis in social justice. (49:9,37; App. 9, 80). But some worried that she had begun to struggle, so she temporarily stayed with her parents who wanted to get her some help. (49:7, 31; App. 32, 56). Because there wasn't an emergency, her parents

didn't call 911; instead, they called the Winnebago County health system. (49:31; App. 56). That call resulted in the government detaining Brooke pursuant to Wis. Stat. §51.15, the statute for involuntary commitment. (11).

According to her mother, Brooke was making statements that didn't make sense. (49:25-6; App. 50-1). She talked about reincarnation, her past lives, and "cried and cried" for a grandfather she had never met. (*Id.*). On the night prior to the detention, Brooke told her mother "don't be surprised if your body is not here tomorrow … your body is not going to be here tomorrow … but you won't be … but your spirit will always be with me". (49:28; App. 53). Brooke also said that her mother would need the suicide hotline number. (49:29-30; App. 54-5).

Brooke's mother was adamant that she didn't know what these statements meant— "I honestly didn't know," she repeatedly stated during her testimony. (49:28; App. 53). But she knew that Brooke was "trying to protect" herself, and she wanted to help even though there was no direct act, attempt or threat that Brooke would harm anyone. (49:26; App. 51).

According to Brooke's father, while her mother called the Winnebago County health department, Brooke was antsy to leave on what she believed was a family trip. (49:31-2; App. 56-7). To calm her down, her father tried to get her to relax on the couch. (*Id.*). In doing so, Brooke "scratched my arm", he said. (*Id.*) Although his arm was scratched, he never received

medical attention, and medical aid was unneeded. (49:34; App. 59). Later, Brooke told him that "the weatherman was going to get [him] and he was going to be carrying a lime green gun". (49:32; App. 57). He did not identify a direct act, attempt, or threat that Brooke would "do him serious physical harm." (49:31-4; App. 56-59).

Winnebago County then sought to intrude upon Brooke's personal health care decisions with a commitment petition. (13). At the final hearing, four witnesses testified: Brooke's mother and father, Brooke, and Dr. Bales. (49:3,23-40; App. 28, 48-65). The testimony of Brooke's parents is, in relevant part, recounted above. Brooke's testimony pertained to the medication order and her own plan for treatment. (49:35-40; App. 61-5).

Brooke testified that she is "currently taking 10 milligrams of Abilify … once a day in the evening", which had helped her to sleep. (49:36; App. 62). Brooke then explained, the medication "helps balance the neurotransmitters, serotonin, dopamine in my brain, which is supposed to help with mood, thinking, and behaviors". (*Id.*). As for side-effects, she explained that one reason she chose to take Abilify is because Lithium (the drug used with forced injection) "had 16 pages of [] side effects, Abilify, [had] four pages of pretty manageable symptoms along with potential medication in case there were side effects" [.] (49:38; App. 64). Brooke agreed that the current medication was helping her, and she felt "pretty healthy". (49:36; App. 62).

In regards to her treatment plan, Brooke said she wanted services from the crisis center. (*Id.*). In addition, she had already met with her own psychiatrist and planned to continue taking the medication even without a court order. (49:39-40; App. 64-5). Although she disagreed with the mental health diagnosis, Brooke said she was voluntarily taking the medication "to follow the advice of medical health professionals and … the Court". (49:38-9; App. 53-4).

The remaining witness testimony was from Dr. Bales who testified that he had met with Brooke "for about a half an hour" a week prior to the hearing. (49:5; App. 30). At that time, Dr. Bales had not yet reviewed Brooke's treatment records or any collateral information. (49:6; App. 31). But after their meeting, Dr. Bales "reviewed the multiple documents", and spoke with Brooke's mother; and (just before testifying) "her treater[.]" (*Id.*).

When asked for his opinion on whether Brooke was a danger to herself or others, Dr. Bales testified:

> Primarily the dangerousness is the assaultive behavior but also this almost a confusion where in the middle of the night she's in the road, it was dark out, and the neighbor felt her to be at risk and brought her home and that's one example where she's simply at risk. And she confirmed that, by the way. There's some details how much traffic, how far in the road and some things but it was alarming, especially considering that she's not fully reality based, but separately she's been getting assaultive and threatening to her family particularly and that --

(49:7-8; App. 32-3). At that point, Brooke's counsel objected to the testimony on hearsay grounds. (49:8; App. 33). The court overruled the objection, reasoning:

> I don't believe it's being offered for the truth of the matter asserted, rather it's being offered for the basis of his opinion, so, for that reason, it's overruled.

(*Id.*). Brooke however never admitted that she was in danger when she walked on the road. Brooke had also met with Dr. Thumann for double the amount of time Dr. Bales met with her and she told Dr. Thumann that "she was walking in the roadway … but she could easily see … headlights of cars from some distance and did not feel as though she was in danger of being hit". (25:3; 81).

Following the testimony, the trial court found that Winnebago County met its burden to involuntarily commit Brooke and forcefully medicate her without her consent. (49:43-45; 33; 34; App. 25, 23, 68-70). In discussing her mental illness, the trial court stated that Brooke was suffering from a mental illness with "recent episodes of spiritually grandiose thinking [and] paranoid delusions". (49:44; App. 69). The court then stated, the "testimony today is clear that she is a danger to herself and others, so the County has met the burden under both the A and B Standards". (*Id.*).[2] The trial court failed to make a specific factual finding

[2] The order for commitment (34; App. 23) contains a scrivener's error in that it mistakenly checks standards B and C instead of A and B that the court clearly intended.

that identified any of the witness allegations made during testimony, and it did not identify a specific act, attempt or threat as proven under either subdivision. (49:43-5; App. 68-70).

In regards to the involuntary medication order, the court concluded that Brooke lacked insight into her condition because she took medication "to comply with court orders", not "due to her medical condition". (49:45; App. 70). Thus, the court concluded that "she is unable to express or apply an understanding of the medications as applicable to her condition". (*Id.*).

Brooke appealed.

The court of appeals' decision begins its analysis of the trial court's requirement to "make specific-factual-findings" under the general notion that "magic words" are not required. *Winnebago County v. B.R.C.,* No. 2023AP1842, ¶18, unpublished slip op. (Wis. Ct. App. February 14, 2024 (App. 10). Then, it applies an "exercise of discretion" analysis based upon the trial court's mention of Dr. Bales' statement that the mental illness causes spiritually grandiose thoughts and paranoid delusion, noting that "appellate courts will accept reasonable inferences from the facts". *Id.,* ¶¶12, 21 (49:7, 44; App. 8, 13, 32, 69).

Under that framework, the court of appeals clings to the trial court's statement concerning Dr. Bales' opinion that Brooke's mental illness caused "episodes of grandiose thinking, [and] paranoid delusions". *Id.,* ¶20 (App. 12). From that it searches the record for witness allegations that the trial court

could have adopted as specific findings. It noted, "[w]hile the trial court's findings were not more fully bolstered with those examples of her spiritual grandiosity, they surely are sufficient, when taken with the reasonable inferences from the record, to conclude that there were specific factual findings". *Id.,* ¶21 (App. 13). So, it affirms the trial court's order because there was enough "with the reasonable inferences from the record, to conclude that there were specific factual findings". *Id.*

Next, the court of appeals' decision addresses the forced medication order. It acknowledges "Brooke's clear elaboration about her medication"—she can identify the prescribed medications, how they assisted her, and their side effects; she took the medication based on the advice of medical professionals, and she agreed to take it sans a court order. *Id.,* ¶¶31, 35 (App. 18-9). The court of appeals then concludes that her disagreement with the doctor's mental illness diagnosis established "that she *may* not have been competent to express an understanding of the advantages or alternatives to treatment:" so, it affirms the involuntary medication order. *Id.*

ARGUMENT

I. The supreme court should grant review and hold that the appellate court circumvents *D.J.W.*'s constitutional safeguard when it resorts to searching the record for witness allegations and inferences that the trial court *failed* "to make [as] specific factual findings" for the applicable dangerousness standard.

A. Every chapter 51 commitment order significantly deprives a person of their core liberty interests protected by the Due Process Clause and "must be able to withstand constitutional scrutiny."

When the government inserts itself into a person's private mental health treatment, courts are to take special care. The United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979). Wisconsin has explicitly agreed that these orders are a significant deprivation of liberty. *Portage County v. J.W.K.,* 2019 WI 54, ¶16, 386 Wis. 2d 672, 927 N.W.2d 509 (citing *Jones v. United States,* 463 U.S. 354, 361 (1983)).

Indeed, consider all the freedoms most adults enjoy—they decide where to live, when to come and go, with whom they associate, which medicines, treatments, and vaccines to accept, the doctors they

entrust with their lives, and with whom they share private healthcare information. These liberties seem axiomatic to our lives in America. But that is not true for a committed person. Even forced outpatient treatment infringes upon these liberties to varying degrees. Commitment orders—at their core—deprive a person of their liberty and freedom to not only be an adult, but also to make important decisions about *their* lives.

"The Constitution forbids the government from 'depriv[ing] any person of life, liberty, or property, without due process of law.'" *Waupaca County v. K.E.K.*, 2021 WI 9, ¶27, 395 Wis. 2d 460, 954 N.W.2d 366 (quoting U.S. Const. amend. V). And people faced with an involuntary commitment have due process protections. *J.W.K.*, 386 Wis. 2d 672, ¶16. These orders impact the "[f]reedom from bodily restraint [that] has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions." *Foucha,* 504 U.S. at 80 (1992); *State v. Post,* 197 Wis. 2d at 302 (1995). And these orders can have lasting implications, with errors potentially "as undesirable as an erroneous conviction." *Addington,* 441 U.S. at 428 (1979).

For Brooke, the impact on her freedom and liberty blinded her. At 31 years old, Brooke was "pretty high functioning" as a teacher working on a master's degree. Now, these orders harm her promising future and hampers her teaching aspirations. Even though the commitment order expired, she struggles every day attempting to overcome them.

B. *D.J.W.* established a clear, easy to apply constitutional safeguard that mirrors the serious nature of a chapter 51 proceeding.

"With such an important liberty interest at stake," this Court established a clear, easy to apply constitutional safeguard to "mirror the serious nature of [a chapter 51] proceeding." *D.J.W.,* 2020 WI 41, ¶43. This constitutional safeguard requires that trial courts (1) "make specific factual findings" (2) "with reference to the subdivision paragraph" the court finds applicable. *Id.*, ¶40.

The court of appeals' decision acknowledges the relative ease of applying this constitutional safeguard; stating that it should take a trial court "less than five minutes to summarize and pull out those specific facts". *B.R.C.,* No. 2023AP1842, n.7. Concluding which specific facts it deemed credible and established with admissible evidence should not be that hard. But as the court of appeals critiques, "[i]t is troubling that circuit courts are still failing to comply with *D.J.W.*'s specific directive, which our supreme court announced four years ago in April 2020." *B.M.T.,* Nos. 2022AP2079 & 2023AP904, ¶24, (WI App February 21, 2024).

C. The trial court violated *D.J.W.*'s simple safeguard to "make specific factual findings" for its identified dangerousness subdivisions.

"[T]he serious nature of the proceeding" against Brooke's core liberty interests was unaccompanied by

D.J.W.'s constitutional safeguard. The trial court merely declared: "The testimony today is clear that [Brooke] is a danger to herself and others, so the County has met the burden under both the A and B standards". (49:44; App. 69). While this clearly identified the dangerousness subdivisions, it completely failed "to make *specific* factual findings" on which accusations it deemed credible and proven by clear and convincing evidence.

The trial court stated the obvious: it had "heard the testimony of Doctor Bales, as well as both parents of [Brooke], and … [Brooke] herself". (49:44; App. 69). Hopefully, every court that conducts a final hearing hears the testimony—but that does nothing to satisfy the constitutional safeguard. Also inconsequential is the court's statement that it was "[r]elying heavily upon the opinion of the medical professional". (49:44; App. 69).

"Opinion" testimony is not a substitute for proof of fact. Indeed, experts may base their "opinion" on unreliable hearsay, but that does not make that hearsay admissible for proof of fact. *See* §907.03; *In re the Guardianship of Therese B.,* 2003 WI App 223, ¶¶8-9, 267 Wis. 2d 310, 671 N.W.2d 377. Accordingly, "[t]he hearsay rule does not prevent a witness from testifying as to what he has heard [or read]; it is rather a restriction on the proof of fact through extrajudicial statements." *Dutton v. Evans,* 400 U.S. 74, 88 (1970). That is, an expert witness may testify to another declarant's out-of-court statement (when not offered for the truth of the matter asserted (or) as basis of

opinion) but it does not allow that testimony to establish the proof of fact.

Here, the trial court noted that the doctor opined that Brooke suffered from a mental illness that impaired her judgment and behavior with "recent episodes of spiritually grandiose thinking [and] paranoid delusions".

But that's it. The trial court grossly failed "to make specific factual findings"; failing even to mention a single alleged act, attempt or threat from any fact witness. It didn't "make specific factual findings" that identified: (1) "recent threats of or attempts at suicide or serious bodily harm; (2) "recent homicidal or other violent behavior"; or (3) "a recent overt act, attempt or threat to do serious physical harm" that placed others in "reasonable fear of violent behavior and serious physical harm" as required by the dangerousness subdivisions the trial court identified. *See* §51.20(1)(a)2.a. & b.

The trial court's comments therefore excluded the constitutional safeguard that this Court intended to mirror the serious nature of the important liberty interests at stake.

D. Appellate courts nullify *D.J.W.*'s constitutional safeguard by searching the record for supporting evidence that the trial court didn't "make [as] specific factual findings".

In its decision, the court of appeals' attempt to remedy the trial court's failure cuts at the core of this Court's constitutional safeguard for chapter 51 proceedings; extracting its very teeth that induce trial court compliance.

The court of appeals begins its application of *D.J.W.*'s constitutional safeguard with the notion that a trial court is not required to use "magic words." *B.R.C.,* 2023AP1842, ¶18 (App. 10-1). But that legal concept has nothing to do with the *D.J.W.* standard. "Specific factual findings" inherently avoid "magic words." "Specific factual findings" are always going to be individualized to each case as opposed to magic words that are mere legal jargon, such as "gravity of the offense" or "utter disregard." So, this starting point is rather curious.

Then, the court of appeals disregards this Court's constitutional safeguard that trial courts "make specific factual findings" —that "should mirror the serious nature of the proceeding"–by resorting to a search of the record for witness allegations and inferences that the trial court never identified as credible or proven. It clings to the trial court's statement that the doctor opined that Brooke's mental illness includes "episodes of spiritually grandiose

thinking [and] paranoid delusions". *Id.,* ¶20; (49:7, 44; App. 8, 12, 13, 32, 69).

But, that is not how our state law defines dangerousness. Almost all major mental disorders diagnostically present with "spiritually grandiose thinking" and "paranoid delusions." These oft uncontrollable, intrusive thoughts that plague these innocent people may help identify the illness, but they don't establish dangerousness. Chapter 51 recognizes this distinction by requiring both a mental illness and dangerousness. Instead of focusing on a patient's "thinking" and "delusions", our state created specific, well-defined standards that focus on "acts, attempts or threats." *See* Wis. Stat. §51.20(1)(a)2.a & b. For example, an intrusive thought about suicide is not an act, attempt or threat to commit suicide. The person suffering from these intrusive thoughts must further the thought or delusion with an act, attempt or threat. Otherwise, the dangerousness requirement would be superfluous.

Once the court of appeals latches on to the trial court's acknowledgement of Dr. Bales' rather ubiquitous opinion regarding "spiritually grandiose thinking" and "paranoid delusions," it set off to make its own specific findings on how Brooke may have carried them out with acts, attempts or threats. *B.R.C.,* 2023AP1842, ¶¶20-1 (App. 12-3). In effect, the court of appeals replaces this Court's constitutional safeguard with a strained erroneous exercise of discretion review. *Id.,* ¶19 (App. 11). This search of the record renders *D.J.W.*'s mandate pointless. Trial

courts would never need to make a "specific factual finding" of an act, attempt or threat; instead, they can merely rely on the court of appeals to search for those allegations that relate to symptoms of the mental illness finding. This is not a protection commensurate with the serious nature of the proceeding and it violates this Court's constitutional safeguard.

II. The supreme court should grant review to clarify that this Court's longstanding decision in *Virgil D. did not* establish an indeterminate prohibition against involuntarily medicating a well-informed person based solely on disagreement with a doctor's opinion as to their mental illness diagnosis.

A. Involuntary medication orders deprive an individual of their liberty interest in refusing unwanted, mind-altering psychotropic drugs, and Wisconsin's laws jealously protect their right to choose which drugs enter their body.

The Fourteenth Amendment protects a person's liberty interests in refusing unwanted medical treatment and in avoiding forcible medication with psychotropic drugs. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶¶43-44, 349 Wis. 2d 148, 833 N.W.2d 607 (citing *Lenz v. L.E. Phillips Career Dev. Ctr.*, 167 Wis. 2d 53, 67, 482 N.W.2d 60 (1996); *Cruzan v. Dir. Mo. Dep't Health*, 497 U.S. 261, 278 (1990); *State v. Wood*,

2010 WI 17, ¶25, 323 Wis. 2d 321, 780 N.W.2d 63; *Washington v. Harper*, 494 U.S. 210, 221 (1990)).

Likewise, Wisconsin law recognizes a person's right, through informed consent, to make decisions about treatments that affect their body. Wis. Stat. §51.61(1)(g)3. Doctors advise the individual on available alternative courses of treatment, but the individual decides whether to consent to the treatment, if the person is competent to do so. *Jones*, 141 Wis. 2d at 739-740 (1987).

Even if a person is mentally ill, dangerous, and under a commitment, they retain the right to consent to the administration of psychotropic drugs. *Id.*, 141 Wis. 2d at 742. "An individual may be psychotic, yet nevertheless capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision." *Melanie L.,* ¶45 (quoting *Jones*, 141 Wis. 2d at 728). Furthermore, the fact that a person ***disagrees*** with the doctor's recommendation does not prove that they are incompetent to make medication decisions.

> The circuit court must maintain the distinction that this court recognized in *Jones* between a patient's mental illness and his or her ability to exercise informed consent . . . The focus of a hearing on the patient's right to exercise informed consent should *not be on whether the court, the psychiatrist, or the County believes the patient's decision is the wrong choice. Rather, the focus must be upon whether the patient understands* the implications of the recommended medication or treatment and is making an informed choice.

> . . . [E]ven if [the patient's] decision to refuse to take the [medication] is a poor choice, it is his to make as long as he understands the implications of that decision. *Simply because [the patient] disagrees with the recommendation of the examining psychiatrist, he does not lose his right to refuse administration of the drug. The County still retains the right to medicate him if an emergency arises. See* §51.61(1)(g)3.

Virgil D. v. Rock County, 189 Wis. 2d 1, 15-16, 524 N.W.2d 894 (1994) (citing *Jones*, 141 Wis. 2d at 728 (1987)). (Emphasis supplied).

B. The trial court deprived Brooke of her liberty interest (and her presumptive competency) to refuse mind-altering medications because she understood the implications of that decision.

Brooke demonstrated her understanding of the implications of taking medications. She agreed to take Abilify because the other drug the hospital was going to inject her with if she refused "had 16 pages" of side effects compared to the "four pages of pretty manageable symptoms" that can be addressed with other "medication in case there were side effects". (49:36-40; App. 61-65). While the context of Brooke's reasoning was which court-ordered drug she would agree to take, her logic as testified to in court was rational and well-explained.

Brooke's testimony also established that she understood the implication of whether to take medication given their potential benefits and

drawbacks. Indeed, Brooke explained that the medication is supposed to help "balance the neurotransmitters, serotonin, [and] dopamine … which is supposed to help with mood, thinking and behaviors". (49:36; App. 59). Shown by both her knowledge of the side effects—even that other medication may offset some side effects—and the potential benefits associated with the recommended treatment, Brooke demonstrated she understood the advantages and disadvantages of available medications. Brooke testified that she felt "pretty healthy" and even disclosed seeking services from the crisis center, that she met with her own psychiatrist, and that she planned to continue her medication even without a court order. (49:39-40; App. 64-5).

But Brooke disagreed with the examining doctor's diagnosis, and explained that she agreed to take the medication "to follow the advice of medical health professionals and … the Court". This caused the trial court to wrongfully conclude that she was "unable to express or apply an understanding of the medications as applicable to her condition". (49:45; App. 70).

C. Appellate courts nullify *Virgil D.* by upholding an involuntary medication order based solely upon the person's disagreement with the doctor's diagnosis.

The court of appeals agrees that "a person can be mentally ill yet nevertheless capable of evaluating the advantages and disadvantages of taking

psychotropic drugs and making an informed decision about the same"; and also, it agrees "that mere disagreement with a physician's medication or treatment recommendations does not establish that someone is incompetent to make those decisions". *B.R.C.,* 2023AP1842, ¶30 (App. 17).

But then, the court of appeals does the exact opposite. It highlights that Brooke disagreed with the doctor's diagnosis, and it apparently disapproves of her wherewithal, incorrectly claiming that she contradicted herself, to continue taking the medications based on her doctor's advice even without a court order. *Id.,* ¶31 (App. 18).

This is precisely what *Virgil D.* counseled not to do. Trial courts are not to rely on the patient's disagreement with the doctor's diagnosis. Instead, the focus is on whether the person understands the implications of their decision.

The court of appeals' analysis should have ended with its acknowledgment that Brooke clearly understood the prescribed medication, its benefits and side-effects, and her willingness to follow the medication advice of her treating physician. But it didn't. Instead, the court of appeals concludes, "she *may* not have been competent to express an understanding of the advantages or alternatives to treatment." *Id.,* ¶35 (App. 19). It fails to explain how this finding comports with the presumption that she is competent and Winnebago County's burden of proof. Instead, the court of appeals' interpretation is that it

will uphold such important liberty deprivations when the person "may" not fully understand because they disagree with the diagnosis. This reasoning does not withstand constitutional scrutiny.

III. The issues for review are not moot, they satisfy exceptions to the mootness doctrine, and they present a live controversy.

The issues here are not moot for the reasons this Court acknowledged in *Sauk County v. S.A.M.,* 2022 WI 46, 402 Wis. 2d 379, 975 N.W.2d 162. This Court explicitly found that "[p]revailing on appeal would … practically alter a committed person's "record and reputation" for dangerousness, a factor a reviewing court must consider when weighing a petition to cancel a firearms ban" under §51.20(13)(cv)1m.b., and also a successful appeal "might influence the reviewing court's weighing of whether restoring gun rights would be consistent with the "public interest."" *S.A.M.,* 2022 WI 46, ¶¶22-3.

Furthermore, this Court explicitly found that "a person's mandatory liability for the cost of care" under §46.10(2) renders the appeal not moot. *S.A.M.,* 2022 WI 46, ¶24. According to § 46.10(2), a committed person like Brooke "shall be liable for the cost of the care, maintenance, services and supplies" related to the commitment. Because a successful appeal voids this liability, "a direct causal relationship exists between vacating an expired [commitment] order and removing the liability it creates[.]" *S.A.M.,* 2022 WI 46,

¶24. According to this Court, "it is irrelevant whether collection efforts have begun because … S.A.M. [like Brooke] remains liable solely by virtue of § 46.10(1)'s mandatory language …. [and] it is enough to overcome mootness when there is the "potential" for collection actions because of the liability." *Id.*, ¶25.

Additionally, this Court should find that the issues presented are exempt from the mootness doctrine. In Wisconsin, "'[m]ootness is a doctrine of judicial restraint." An issue is moot when its resolution will have no practical effect on the underlying controversy." *Marathon County v. D.K.*, 2020 WI 8, ¶19, 390 Wis. 2d 50, 937 N.W.2d 901.

D.K. listed 5 exceptions to the mootness doctrine. An appellate court may overlook the lack of a live controversy if: (1) the issue is of great public importance; (2) the issue involves the constitutionality of a statute; (3) the issue arises often and a decision is essential; (4) the issue is likely to recur and this Court should resolve it to avoid uncertainty; and (5) the issue is likely to recur and evade review. *Id.*, ¶19.

The issues here satisfy the first, fourth and fifth exceptions to the mootness doctrine. *D.J.W.* created a clear, easily applied constitutional safeguard. But as the court of appeals complains, trial courts are failing to comply and these errors are overwhelming the appellate courts. Guidance from this Court is imperative to stress that the continued failures of trial courts, and the corresponding large number of appeals, is no reason to discard this Court's

constitutional safeguard. These orders deprive people of their core liberty interests, which this Court has stressed must be stripped away only by safeguards that "mirror the serious nature of [the] proceeding."

CONCLUSION

For the reasons stated above, Brooke respectfully requests that the supreme court grant this petition for review.

Dated this Wednesday, March 13, 2024.

Respectfully submitted,

Electronically signed by Timothy C. Drewa
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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 6,157 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 Thursday, March 14, 2024.

Signed:
Electronically signed by
Timothy C. Drewa
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Assistant State Public Defender