STATE OF WISCONSIN

IN SUPREME COURT

Case Number: 2023AP1842

In the matter of the Mental Commitment of B.R.C.:

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

B.R.C.,

Respondent-Appellant-Petitioner

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 involuntary commitment and medication order case, the circuit court found that the County met its burden to prove that Brooke[1] was mentally ill, a proper subject for treatment and dangerous. (34; App. 102-103). The circuit court believed the County proved dangerousness pursuant to Wis. Stats. §§ 51.20(1)2.a. and b.. *Id.* The court also entered an involuntary medication order pursuant to Wis. Stat. § 51.61(1)(g)4.. (33; App. 104).

At the conclusion of the trial, the court found the expert to be credible. (49:44; App. 107). He stated the dangerousness standards explicitly. *Id.* The court found Brooke's recent behavior fit squarely within both dangerousness standards: "She has had recent episodes of spiritually grandiose thinking, paranoid delusions." *Id*. As observed by the court of appeals, the trial court's findings "obviously relate[] to a large portion of Brooke's mother's testimony …" (*Winnebago County v. B.R.C.*, No. 2023AP1842 unpublished slip op., (WI App February 14, 2024) ¶20).[2](App. 120). The trial court's findings complied with the *Langlade County v. D.J.W.*[3] directive that circuit courts must "make specific factual findings with reference to the subdivision paragraph of Wis. Stat. §

[1] To be consistent with the Petitioner and the court of appeals decision and to maintain confidentiality, the County refers to B.R.C. as "Brooke" in its response.
[2] Pursuant to Wis. Stat. § 809.23(3)(b), this unpublished case is cited for its persuasive value only.
[3] 2020 WI 38, 376 Wis. 2d 448, 899 N.W.2d 381.

51.20(1)(a)2. on which the commitment is based." *D.J.W.*, ¶3.

In a straightforward decision, the court of appeals agreed that the trial court met the *D.J.W.* directive and that there was sufficient evidence of dangerousness. *B.R.C.,* ¶¶20-22, 29. (App. 120-122, 125). It also found that there was sufficient evidence of her incompetency to refuse medication. When Brooke denied her mental illness, she demonstrated she was substantially incapable of applying an understanding of the advantages, disadvantages and alternatives of the medication to her illness. *Id.,* ¶35. (App. 127).

This Court should deny the petition for review for four reasons. First, the court of appeals correctly decided all issues in this case. Second, the petition fails to satisfy any of the criteria required for this Court to grant review. Third, the involuntary medication order is moot, and Brooke does not explain how an exception to the mootness doctrine applies. Finally, Brooke's argument that there was insufficient evidence to support both orders 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). Brooke has not presented special and important reasons to grant review in her petition. The statutory criteria in section 809.62(1r) have not been met. Brooke's petition should be denied for the following reasons.

I. The court of appeals decided this case correctly.

The decision of the court of appeals is not in conflict with the Wisconsin Supreme Court's decision in *D.J.W.* and, therefore, Brooke's petition does not meet one of the many criteria for granting review. *See Wis. Stat. § 809.62(1r)(d).*

A. The trial court made sufficient factual findings consistent with *D.J.W.*.

In its decision, the court of appeals accurately recited the *D.J.W.* directive "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." *B.R.C.*, ¶16 (citing to *D.J.W.*, ¶40)(App. 117). It accurately recited the purpose of the holding in *D.J.W.*. "First, it provides clarity and extra protection to patients regarding the underlying basis for a []commitment." *Id.* (citing to *D.J.W.*, ¶42). "Second … a requirement of specific factual findings … 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." *Id.* ¶17 (citing to *D.J.W.,* ¶44)(App. 118).

Unlike *D.J.W.,* no guesswork is required when reviewing the record in this case. *See D.J.W.*, ¶45. 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. Unlike *D.J.W.,* everyone in Brooke'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. The trial court's findings were as follows:

> … the Court having heard the testimony of Doctor Bales, as well as both parents of [Brooke], and having heard from [Brooke] herself, does make the following findings: Relying heavily upon the opinion of the medical professional here – that being Doctor Bales – the County has met the burden showing by clear and convincing evidence that [Brooke] is currently suffering from a major mental illness, that being bipolar disorder with manic and psychotic tendencies, which is a treatable condition. Though it is a substantial disorder of her thought, her mood, and her perception, it is grossly impairing her judgment as well as her behavior and her capacity to recognize reality.
>
> She has had recent episodes of spiritually grandiose thinking, paranoid delusions. The testimony is clear that she is a danger to herself and others, so the County has met the burden under both the A and the B standards.

(49:44; App. 107).

The court of appeals correctly observed that the trial court "itemized the concerning behavior" when it found "[s]he had recent episodes of spiritually grandiose thinking, paranoid delusions." *B.R.C.,* ¶20. (App. 120). The "spiritually grandiose" reference "obviously relates to a large portion of the mother's testimony." *Id. See*

(R49:23-30). The doctor's report also contained Brooke's statements about "taking spiritual baths and other delusional sounding subjects" and her admissions about making threats to hurt others. (R41:1). The court of appeals observed that the trial court could reasonably infer from these credible sources "that the trial court found Brooke's conduct to be a sound basis upon which to conclude she was dangerous under the relevant statutory provisions". *B.R.C.,* ¶21. (App. 121).

The trial court's findings were specific and related back to the credible testimony of the witnesses. The findings could have been even more specific, but as concluded by the court of appeals, they are "sufficient to allow appellate courts to conduct a meaningful review of the trial court's exercise of discretion and the evidence presented at the hearing." *B.R.C.*, ¶ 21. (App. 121-122). Thus, the stated purpose of the *D.J.W.* directive was satisfied.

B. A review of the entire record demonstrates that there was sufficient admissible evidence of Brooke's dangerousness to herself and others.

The court of appeals properly reviewed the entire record and deferred to the credibility determinations of the trial court to conclude that there was sufficient evidence of Brooke's suicidal ideation pursuant to Wis. Stat. § 51.20(1)(a)2.a.. The court accurately summarized the credible and admissible testimony of Brooke's mother and

father, which supported the trial court's conclusion that Brooke's recent acts and threats put them "in reasonable fear for their safety from violent behavior and serious bodily harm from Brooke." *Id., ¶ 29. See* Wis. Stat. § 51.20(1)(a)2.b

C. The record contains sufficient evidence of Brooke's incompetence to refuse medication to treat her bipolar disorder because she denied she was mentally ill and lacked insight into how medication can treat her mental illness.

Once again, Brooke's complaint about the medication order is not well-developed because it ignores the totality of Dr. Bales' testimony and reports. Issues on appeal that are undeveloped are not considered by the court of appeals. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). The judge stated in his findings that he relied "heavily upon the opinion of the medical professional here – that being Doctor Bales. … ." (49:44; App. 107). Brooke also fails to mention that she did not just disagree with her doctor about a type of medication; she also disagreed that she was mentally ill. Lastly, she ignores the obvious impact her lack of insight into her illness has on her ability to truly apply and understand the explanation of medications. As the trial court found and the court of appeals affirmed, Brooke cannot understand the benefits of psychotropic medications because she does not believe she

is mentally ill. As a result, she could not make an informed choice to accept or refuse treatment.

Brooke's reliance on *Virgil D. v. Rock County*[4] is seriously misplaced for several reasons. First, when the court considered *Virgil D.* in 1994, there was only one way, not two, the County could prove incompetence. At that time, what is now Wis. Stat. § 51.61(1)(g)4.a. was the only standard. Because Virgil D. could express an understanding of the medication explained to him, the court held that the trial court could not find him incompetent to refuse even though he lacked insight into his mental illness. *Id.* at 13.

The legislature responded to *Virgil D.* and enacted what is now Wis. Stat. § 51.61(1)(g)4.b., so that individuals, like Virgil D., who deny they are mentally ill and lack insight into their mental illness, yet are able to express an understanding of the doctor's explanation of medication, can still be found incompetent to refuse medication. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶52, 349 Wis.2d 148, 833 N.W.2d 607.

Second, *Virgil D.* is irrelevant to the issues in this petition because the court of appeals decision relies solely on the 4.b. standard in this case. *B.R.C., ¶17.* (App. 118). There was sufficient evidence presented about the 4.b. standard because the doctor's testimony mirrored the statutory standard. It, therefore, met the standard. *Winnebago County v. Christopher S.*, 2016 WI 1, ¶56, 366

[4] 189 Wis.2d 1, 524 N.W.2d 894 (1994)

Wis. 2d 1, 878 N.W.2d 109. The record includes credible expert testimony and two reports to prove by clear and convincing evidence that Brooke was substantially incapable of applying an understanding of the explanation of medication provided to her by Dr. Bales to her bipolar disorder because she repeatedly denied that she had a mental illness. At trial she could not credibly apply an understanding of the benefits of medication to treat her bipolar disorder because she did not believe she has the disease. The legislature specifically intended to capture this presentation in the competency statute so that psychiatrists like Dr. Bales can provide the treatment a psychotic and dangerous individual like Brooke can benefit from. *See Melanie L.,* ¶ 52.

II. Brooke fails to convince this Court that any of the criteria in Wis. Stat. § 809.62(1r) justify review of her case.

Brooke's attempt to reframe *D.J.W.* as a "constitutional safeguard" does not present a real and significant constitutional issue. The court's holding in *D.J.W.* has been described in several ways since its publication in 2020. Most commonly, it is referred to as a "mandate" or a "directive." Now, Brooke coins a new phrase, "constitutional safeguard", and repeats it twenty-four times in her petition. She complains that "the court of appeals has gutted these protections" and that "this raises a constitutional question of whether such a review 'mirror[s] the serious nature of the proceeding' and core liberty

interests at stake." Petitioner's Petition, p. 9. Yet, her argument lacks specificity and proper legal development. Is she arguing that as applied to her, the court's decision is unconstitutional? If so, how? Is this a facial challenge to a section of Chapter 51? If so, which one? It is not up to the County, nor this Court, to define her vague constitutional argument.

Similarly, she raises another poorly defined constitutional argument concerning the medication order when she complains that "the court of appeals nullified [her] core liberty interest" and that "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." *Id.* at pp. 9-10.

These are new arguments; Brooke not bring these before the trial or appellate courts. Appellate courts will only consider constitutional issues raised for the first time on appeal if it is in 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). Brooke does not address any of these criteria to justify this Court's consideration of a new issue on appeal. Her argument also highlights a highly contested fact at issue: whether Brooke "clearly understands the implication" of her decision to refuse medication. The expert, trial court and court of

appeals all concluded that Brooke is *substantially incapable* of applying an understanding of the explanation about medication to her condition in order to make an informed choice as to whether to accept or refuse medication.

Every court case involves constitutional issues on a general level, and this case is no exception. However, Brooke failed to raise a specific constitutional issue below and the circuit 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.

Brooke argues without support that two additional criteria justify this Court granting her petition. *See* Wis. Stat. § 809.62(1r)(c)2. and 3. Both criteria require that this Court's decision on her issues "will help develop, clarify or harmonize the law." First, she presents a novel, but unsupported, reading of *D.J.W*. as explained above in Argument I. Second, the appeal of both orders and her claims that there was insufficient evidence present both *factual* and legal issues. As such, § 809.62(1r)(c)3. does not apply.

Lastly, Brooke is troubled by the trial and appellate courts' decisions. She is also concerned that circuit courts across the state are not making specific factual findings that will assist in appellate review of cases. However, she repeatedly ignores the record. In her case, the trial judge, in fact, made specific factual findings that relate directly to the

dangerous standards alleged and the credible evidence. As evidenced in its opinion, the findings assisted the appellate court in its review. Could the findings have been "bolstered" by additional facts? The court of appeals believed so. Nevertheless, when it applied the standard of review, it believed the findings to be sufficient. The trial and appellate courts followed the law in this case.

III. Brooke's medication order is moot and Brooke does not explain how an exception applies.

The six-month commitment and medication orders on appeal in this case expired on October 17, 2023. While the medication order is moot, the County acknowledges that the commitment order is not moot due to ongoing collateral consequences directly related to that 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. Because "there is no causal relationship" between a medication order alone and the collateral consequences stemming from a commitment, an expired medication order is moot. *Outagamie County v. L.X.D.-O.*, 2023 WI App 17, ¶14, 407 Wis. 2d 441, 991 N.W.2d 518.

This case involves challenges to the sufficiency of the evidence supporting a medication order. Such challenges always turn on the specific facts of the case at issue and provide no reason for this Court to find an applicable exception to the mootness doctrine. *See Waukesha County v. S.L.L.*, 2019 WI 66, ¶41, 387 Wis. 2d 333, 929 N.W.2d 140 ("[c]hallenges to the sufficiency of evidence are

necessarily fact-bound inquiries that will vary from case to case.").

There are exceptions to the mootness doctrine, however, Brooke does not attempt to explain whether any exceptions apply to her medication order. Her arguments concerning the applicable exceptions apply only to the commitment order and her *D.J.W.* argument. It is her burden to convince this Court that it should consider the moot issue. See *Rock County v. P.P.*, No. 2021AP678, unpublished slip op., (WI App December 16, 2021) ¶19 ("P.P. does not explain how any of the particular circumstances involved in his sufficiency challenge are likely to be repeated.").[5] (App. 137). She fails to meet this burden.

IV. Brooke'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, Brooke's argument that the record in her case 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 Brooke to testify about her mental illness, treatability, dangerousness and her incompetence to refuse medication.

[5] Pursuant to Wis. Stat. § 809.23(3)(b), this unpublished case is cited for its persuasive value only.

During his testimony, the County modeled its questions around the statutory standards and asked many clarifying questions. Dr. Bales 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 Brooke's mental illness and her refusal to properly treat it, or even acknowledge that she was mentally ill. The County also called two fact witnesses, Brooke's mother and father, who were intimately aware of Brooke's worsening illness and dangerous behavior.

Despite the large volume of credible expert testimony presented at the court trial, the court's specific factual findings and the court of appeals' well-reasoned decision, Brooke 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" when it observed that "[s]he had recent episodes of spiritually grandiose thinking, paranoid delusions." *See D.K.*, ¶55. The court of appeals observed that the circuit court's findings "*obviously* related to a large portion of Brooke's mother's testimony, …" *B.R.C.,* ¶20 (emphasis added). (App. 120). And, that "[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 (emphasis added). (App. 121).

Brooke's demands for more evidence in her case are 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).

Brooke's demands for *more* specific factual findings are an attempt to expand the court's purpose behind *D.J.W.* While the holding in *D.J.W.* was specific to the facts in that case and it addressed a long-standing issue in recommitment cases, it was also arguably a restatement of the circuit court's already existing duty to make factual findings in every case. *See* Wis. Stats. §805.17(2) (" In all actions tried upon the facts without a jury … the court shall find the ultimate facts and state separately its conclusions of law thereon."). As such, Brooke's demands are also an attempt to change § 805.17(2), which states in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. … Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

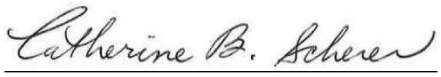
To effect the changes Brooke really wants, she needs to ask the legislature. "Our form of government provides for one legislature, not two." *Flynn v. DOA,* 216 Wis. 2d 251, 529, 576 N.W.2d 245 (1998).

CONCLUSION

For the reasons stated above, this Court should deny the petition for review.

Dated and electronically filed this 18th day of April, 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 3,399 words.

Dated this 18th day of April, 2024.

Signed,

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