STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP1195

SHEBOYGAN COUNTY,

Plaintiff-Respondent,

v.

N.A.L.,

Repondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. In 2005, Justice Louis Butler, dissenting from an order dismissing a petition as improvidently granted, asked whether it was legally permissible for a person to stipulate to an involuntary commitment under Chapter 51. Two decades later, questions about this procedure persist, as is clear in the opinion issued by the Court of Appeals in this case.

   Are stipulations to involuntary mental commitments and accompanying involuntary medication orders legally permitted?

   This issue is being raise for the first time in this petition.

2. N.A.L. appeared by phone at his final hearing. His counsel stated that he was willing to stipulate to commitment, but during the hearing N.A.L. asked what a stipulation was, stated he thought the court hearing was to determine when he would be discharged from Winnebago, and, after the court accepted the stipulation, asked what he had just agreed to.

   Did the trial court violate N.A.L.'s due process rights by accepting the stipulation for commitment and issuing an order for involuntary medication without conducting a

colloquy to ensure the stipulation was knowing, intelligent, and voluntary?

The trial court answered "no."

The court of appeals answered "no."

This Court should answer "yes."

CRITERIA FOR REVIEW

Review is warranted because a decision will answer two real and significant questions of federal and state constitutional law—whether a stipulation to an involuntary commitment is ever appropriate and, if it is, whether a colloquy must be conducted before a trial court can accept a stipulation to a civil commitment. Wis. Stat. § 809.62(1r)(a); *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254 (1980) (discussing how mental health commitment implicate the fundamental constitutional rights of the commitees).

These issues also present novel questions, the resolution of which will have state-wide impact, and are not factual in nature but present questions of law which are likely to recur unless resolved by the supreme court. Wis. Stat. § 809.62(1r)(c)(2)-(3). The Wisconsin Supreme Court previously granted review on the question of whether a colloquy was required, but the petition was ultimately dismissed as improvidently granted. *In re Mental Commitment of Aaron J.J.*, 2005 WI 162, 286 Wis. 2d 276, 706 N.W.2d 659. In a dissent from that decision, Justice Butler

noted that there did not appear to be a statutory basis for a stipulated involuntary commitment, or "voluntary commitment," in Chapter 51. *Id.* at ¶5, Butler, J. Dissenting.

Since *Aaron J.J.*, the question of whether a colloquy is required when accepting a stipulation in an involuntary commitment proceeding has only been addressed in unpublished opinions, including the court of appeals decision in this case. *In re Mental Commitment of N.A.L.*, No. 2024AP1195, unpublished slip op. ¶12 (WI App Feb. 5, 2025) App. 3; s*ee also, e.g., In re Mental Commitment of L.A.T.*, No. 2022AP603, unpublished slip op. (WI App Jan. 11, 2023) App. 29; *In re Mental Commitment of N.W.*, No. 2019AP48, unpublished slip op. ¶1 (WI App Aug. 29, 2019) App. 38. However, none of these cases provide clarity as to whether Chapter 51, and more broadly, the constitution, permit a person to voluntarily stipulate to an involuntary mental health commitment. Nor do these decisions provide clear direction for lower courts on how to conduct hearings in which someone stipulates to their own involuntary commitment, if permissible at all. As such, this Court should accept review to ensure involuntary commitments in Wisconsin conform with constitutional requirements.

STATEMENT OF FACTS

At a final hearing in connection with the County's request for an initial six-month involuntary commitment order and accompanying involuntary medication order, N.A.L. and his counsel appeared by phone. (40:1; App. 20) N.A.L.'s counsel reported that N.A.L. wanted to stipulate to the county's proposed orders. (40:2; App. 21). N.A.L. then interrupted to ask, "What's a stipulation?" *Id.* The court explained that a stipulation meant that N.A.L. was agreeing that he could be committed. (40:3; App. 22). When the court asked N.A.L. if he was indeed agreeing to this, he responded, "I suppose." *Id.*

Later in the hearing, N.A.L. asked how long he would have to wait to be discharged from Winnebago. (40:4; App. 23). When the court explained that his discharge date would be up to the doctor, N.A.L. responded, "Well, I thought we were evaluating that today on the court date." *Id.* The court then asked N.A.L.'s counsel if he wanted a chance to speak to his client but counsel declined the opportunity. (40:5; App. 24). Eventually, N.A.L. said he understood that it would be up to the doctors when he would leave Winnebago, but when asked if he was "also agreeing that there can be a commitment order," he replied, "[o]nly if I'm able to be discharged in the next, you know, agreeable period of time." The court then said, "it's unclear to me whether this is an actual stipulation to commitment or not." (40:6; App. 25).

One of the psychiatrists who had conducted an examination of N.A.L., Dr. Marshall Bales, then spoke up and said that while he didn't "want to speculate" he estimated that N.A.L. would likely be out of Winnebago in a day or two. (40:7; App. 26). N.A.L. said that this estimate helped, and that he was willing to agree to the commitment. *Id.* However, after the court accepted the stipulation, N.A.L. asked, "[s]o then I'm supposed to be released in a few days of my commitment, or what does this mean?" *Id.* The court instructed N.A.L. to contact his lawyer, who had already left the hearing, to find out what he had agreed to. *Id.* The court did not conduct a colloquy to determine whether the stipulation and its attendant waiver of rights was knowing, intelligent, and voluntary.

On December 7, 2023, the court entered an order of commitment based on the stipulation and an order of involuntary medication and treatment. (23; App. 17); (22). On December 15, 2023, N.A.L. timely filed a notice of intent to pursue post-disposition relief. (27). On May 7, 2024, N.A.L. filed a post-disposition motion arguing that the trial court had erred by not conducting a colloquy in order to ensure his stipulation was knowing, intelligent, and voluntary. (53). The trial court denied the motion in a written order. (67; App. 19). N.A.L. then appealed and the court of appeals affirmed.

The court of appeals declined to adopt a colloquy requirement, finding that the issue had already been "squarely addressed" in the unpublished case. *In re*

Mental Commitment of N.A.L., no. 2024AP1195, ¶12, unpublished slip op. (WI App Feb. 5, 2025) (citing *In re Mental Commitment of N.W.)* App. 11. The court noted that although involuntary commitments involve a significant deprivation of liberty, they are not punitive and so are not equivalent to criminal proceedings. *Id.* at ¶14; App. 12. It further noted that a personal colloquy is not required by statute. *Id.*

The court found that because grounds for continued commitment must be proved every year, less demanding due process requirements are justified. *Id.* at ¶16; App. 13-14. The court also noted that N.A.L.:

> may be more successful arguing for the elimination of stipulations in all ch. 51 proceedings, because importing criminal-level requirements to ensure a knowing, intelligent and voluntary stipulation would make stipulations more susceptible to challenge than in criminal or TPR cases so that counties may simply choose to forego agreeing to them altogether. This is so because the foundational evidence for the court's finding that a committee is mentally ill, such as medical reports explaining that the committee is mentally ill, would necessarily provide an enhanced basis—beyond any existing in a criminal or TPR case—for the committee to subsequently argue that the stipulation was not knowingly, voluntarily and intelligently entered, i.e., that the committee did not understand the proceedings and/or what he/she was agreeing to. Indeed, even if the circuit court did everything it was supposed to do during a colloquy and a

> committee gave all the correct answers to make the court believe he/she was knowingly, voluntarily and intelligently entering into the stipulation, the committee would have stronger grounds than any defendant in a criminal case or parent in a standard TPR case for claiming he/she did not knowingly, voluntarily and intelligently agree to the stipulation.

Id. at ¶17; App. 14-15.

ARGUMENT

I. This Court should accept review and find that there is no legal basis for stipulations to involuntary commitments under Chapter 51.

Involuntary commitments are governed by Wis. Stat. § 51.20. The statutory scheme, interpreted by subsequent case law, requires the County to prove and a Court to find: (1) that the individual is mentally ill, drug dependent, or developmentally disabled; (2) that the individual is a proper subject for treatment; and (3) that the individual is dangerous. Wis. Stat. § 51.20(1)(a)(1)-(2). If these allegations are proven, the court must order the individual committed to the care and custody of the appropriate county department. Wis. Stat. § 51.20(13)(a)(3). Although Chapter 51 provides a procedure for the voluntary admission of adults to inpatient treatment facilities, the statutes do not contemplate a stipulation to an involuntary commitment. *See* Wis. Stat. §§ 51.10 and 51.20.

There is an obvious tension in allowing someone who is incapable of managing their own life waive important due process rights. To be involuntarily committed, committees are necessarily found to be either mentally ill, drug dependent, or developmentally disabled as well as dangerous to themselves or others. Wis. Stat. § 51.20. Put another way, the commitment requires a finding that the committee is so incapable of managing their own life that they pose a danger to themselves or others. As the court of appeals pointed out, these findings appear to be at odds with a finding that someone knowingly, intelligently, and voluntarily waived their fundamental due process rights. *N.A.L.* at ¶ 17; App. 14-15; *Vitek*, 445 U.S. 480, 491 (1980).

This case demonstrates that exact tension. The circuit court asked several times whether N.A.L. intended to stipulate to the commitment and whether he agreed to be committed. Although N.A.L. eventually answered "yes" to most of these questions, it is clear from the record that even after the stipulation was entered N.A.L. did not understand what he had agreed to. This is not surprising because the county alleged, and the court found, that N.A.L. was mentally ill to the extent that he was dangerous. And as the court of appeals noted, even if a court were to conduct a colloquy to ensure a committee's stipulation was knowing, intelligent and voluntary, the very finding that the committee was mentally ill could provide a basis to challenge the waiver. *N.A.L.* at ¶ 17; App. 14-15.

With or without a waiver colloquy, these stipulations circumvent the due process rights guaranteed by the statute. Chapter 51 was enacted by the legislature after its predecessor was found to be unconstitutional for failing to safeguard due process rights. *See Lessard v. Schmidt*, 346 F.Supp. 1078, *vacated on other grounds*, 414 U.S. 473 (1974). It provides a robust mechanism under which the county must prove that the respondent satisfies the criteria. It provides numerous safeguards designed to make that standard of proof meaningful, including a requirement that the respondent be provided adversary counsel, Wis. Stat. § 51.20(3), the appointment of two independent examiners to determine whether the respondent is actually mentally ill, Wis. Stat. § 51.20(9), and a right to a jury trial to determine whether the State can sufficiently prove its allegations, Wis. Stat. § 51.20(11). Allowing stipulations to involuntary commitments permits a person with such a severely untreated mental illness that they are dangerous to waive their fundamental due process rights despite being potentially unable to understand those rights. Accordingly, this Court should accept review and find that stipulations to commitment are not allowed under Chapter 51.

II. The trial court erred by failing to conduct a colloquy to ensure that N.A.L.'s stipulation to commitment and attendant waiver of rights was knowing, intelligent, and voluntary.

If stipulations to involuntary commitments are allowed under Chapter 51, colloquies are necessary to ensure the waiver of rights is knowing, intelligent and voluntary.

A. Colloquies are necessary when an individual waives a fundamental right.

The United States Supreme Court has recognized the importance of colloquies since at least 1969 when it decided *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). In *Boykin*, the Court reversed a defendant's conviction because the record did not affirmatively demonstrate that he voluntarily and intelligently entered his guilty pleas in five cases of robbery. *Id.* at 240. The Court observed, "So far as the record shows, the judge asked no questions of the petitioner concerning his plea, and petitioner did not address the court." *Id.* at 239. Later, the Court explained:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any

> review that may be later sought and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

Id. at 243-44 (internal citations omitted). *Boykin* explained that colloquies were necessary, in part, because of the importance of the rights being waived: "First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment… Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record." *Id.* at 243 (internal citations omitted). In sum, *Boykin* held that the colloquies are required to protect important rights and create a record which makes clear whether the waiver of rights is knowing, intelligent, and voluntary.

Wisconsin courts have followed the reasoning of *Boykin* and extended the colloquy requirement to waivers of rights outside of the context of a criminal plea. In doing so, they have recognized "the important role such colloquies play in protecting fundamental constitutional rights." *State v. Francis*, 2005 WI App 161, ¶ 15, 285 Wis. 2d 451, 701 N.W.2d 632. Generally, Wisconsin courts have held that an on-the-record colloquy is necessary when an individual waives a *fundamental* right. For instance, in *State v. Weed*, 2003 WI 85, ¶ 2, 262 Wis. 2d 434, 66 N.W.2d 485, the Wisconsin Supreme concluded that a defendant's right to testify in his or her own defense was a fundamental constitutional right and that it therefore required the protection of an on-the-record colloquy. Similarly, in

State v. Anderson, 2002 WI 7, ¶ 23, 246 Wis. 2d 586, the Wisconsin Supreme Court concluded that a waiver of the right to a jury trial required a colloquy because "without a personal colloquy, we are unable to determine that Anderson's jury trial waiver is knowing, intelligent, and voluntary. The right to a jury trial is a fundamental right." (footnote omitted). Colloquies are also required in termination of parental rights cases when the respondent enters a plea and, in fact, courts apply the same framework as they do in criminal cases to determine whether a plea should have been accepted. *See In re B.W.*, 2024 WI 28, ¶ 47, 412 Wis. 2d 364, 8 N.W.3d 22.

Personal colloquies are also required in the context of involuntary commitments. In *In re Mental Commitment of S.Y.*, 162 Wis. 2d 320, 336, 469 N.W.2d 836 (1991), the Wisconsin Supreme Court held that a respondent in an involuntary commitment proceeding under Chapter 51 could only waive the right to counsel when the trial court had examined the respondent and determined that the waiver was knowing and voluntary. In upholding the waiver in that case, the Court specifically relied on a full colloquy conducted by the trial court. *Id.* at 333-339.[1]

[1] The Court in *S.Y.* applied the criminal standard regarding waiver of the right to counsel as set out by the then-controlling *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), which required that the record be sufficient to show the waiver was intelligent and voluntary. *Pickens* was later supplanted in the criminal context by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), which explicitly required a detailed personal colloquy. Wisconsin courts have since

B. A stipulation to a civil commitment involves the waiver of fundamental rights and requires a colloquy.

A stipulation to a commitment waives two separate but related fundamental rights. The first is an individual's right to freedom from physical restraint. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780 (1992). Freedom from physical restraint is a fundamental right. *Id.* The second is a respondent's due process rights to a fair hearing in which the petitioner must prove by clear and convincing evidence that he is both mentally ill and dangerousness. *Matter of D.K.*, 2020 WI 8, ¶ 29, 937 N.W.2d 901; *Lessard v. Schmidt*, 346 F.Supp. 1078, *vacated on other grounds*, 414 U.S. 473 (1974), (finding that the predecessor to the current Wis. Stat. Ch. 51 was unconstitutional for failing to protect an individual's fundamental due process rights). As in *Boykin*, the protection of these rights requires a colloquy to ensure that that any waiver is knowing, intelligent, and voluntary.

Wisconsin has already decided that the right to counsel is important enough to a person subject to Chapter 51 proceedings to require a waiver colloquy. *See S.Y.*, 162 Wis. 2d at 336. The right to counsel is an important due process safeguarded in Chapter 51 commitments, and accordingly its waiver requires a colloquy and a record sufficient to show that the

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concluded that "in ch. 51 proceedings, the *Klessig* standards apply to waivers of the right to counsel." *In re Commitment of Thiel*, 2001 WI App 32, ¶ 17, 241 Wis. 2d 465, 626 N.W.2d 26.

waiver is knowing, intelligent, and voluntary; it follows, then, that waiver of other important and fundamental rights would also requires at least as much protection.

Here, N.A.L. was not afforded such protections of his important and fundamental rights afforded to him by Chapter 51 and the constitution. He appeared by phone and, although his counsel represented that he was willing to stipulate to commitment, the record demonstrates that he did not know what such a stipulation would entail nor what it meant. He believed the purpose of the hearing was to determine if he could be released from Winnebago and agreed to the stipulation because he believed it meant he would be released in a few days. It is clear that after the stipulation was accepted, he did not understand its effects or what he had agreed to.

The court of appeals found that the trial court did, in fact, attempt to determine if N.A.L. intended to waive his rights, and confirmed that N.A.L. wanted to enter into the stipulation. *N.A.L.* at ¶12; App. 11. As an initial matter, whether N.A.L.'s stipulation was actually knowing, intelligent, and voluntary is a separate question from whether a stipulation to an involuntary commitment requires a formal colloquy. Because it involves the waiver of fundamental rights, it does. But here, although N.A.L. eventually answered yes to most of the court's questions, the record does not indicate that the stipulation was knowing, intelligent and voluntary. Again, N.A.L. initially believed the purpose of the hearing was to

determine if he could be released and only agreed to the stipulation because he believed it meant he would be released in a few days.

The court of appeals also found that because grounds for continued commitments must be proved every year, and because commitments are not punitive in nature, stipulations to involuntary commitments do not require the same protections as criminal pleas. *N.A.L.* at ¶16; App. 13-14. While it is true that involuntary commitments are not punitive in nature, they still involve a loss of fundamental rights and, accordingly, a colloquy is still required when a respondent waives those rights. *See e.g. Matter of D.K.*, 2020 WI 8, ¶ 29. The fact that it is a civil proceeding does not change this requirement; colloquies are already required when a respondent waives his right to counsel in an involuntary commitment proceeding. *See S.Y.*, at 336.

And although grounds for continued commitments must be proved at least once a year, prior stipulations are relied on by courts in recommitment hearings to provide grounds for recommitment. In a recommitment proceeding, the petitioner is not required to prove recent acts establishing dangerousness; instead it may show that there is a substantial likelihood that the committee will become dangerous again should treatment lapse. *In re Mental Commitment of J.W.K.*, 2019 WI 54, ¶19, 386 Wis. 2d 672, 927 N.W.2d 509. In the recent *In re Mental Commitment of L.L.*, a committee argued that there was insufficient evidence to support a finding

that she was dangerous for the purpose of her recommitment. 2024AP1443, unpublished slip op. (WI App Feb. 26, 2025); App. 42.[2] The circuit court found that the committee was likely to become dangerous again should treatment be withdrawn. *L.L.* at ¶19; App. 45. L.L. argued, however, that the only "evidence" of dangerousness presented at her initial commitment proceeding had been hearsay and, thus, the finding that she was likely to become dangerous again was based on insufficient evidence. *Id.* at ¶25; App. 46. The court of appeals held, however, that because L.L. had stipulated to the initial commitment, the circuit court could rely on the allegations in the Statement of Emergency Detainment to determine that L.L. both had been dangerous and was likely to become so again. *Id.* at ¶27; App. 46. Because a stipulation to an involuntary commitment can be relied upon as a factual basis in future recommitment proceedings, the fact that grounds for recommitment must continue to be proved provides little protection to committees who unknowingly waive their fundamental rights during the initial proceeding.

[2] Consistent with Wis. Stat. 809.23, this unpublished opinion is cited only for persuasive value.

C. This Court should accept review and find that personal colloquies are required when a respondent stipulates to an involuntary commitment.

This issue presents an open question which has continued to recur. This Court granted review of this issue in 2005, but the petition was ultimately dismissed as improvidently granted. *In re Mental Commitment of Aaron J.J.*, 2005 WI 162, 286 Wis. 2d 276, 706 N.W.2d 659. In the two decades since, although this question has come before the court of appeals a number of times, it has not been answered in a precedential decision. Rather, it has only been addressed in unpublished decisions. *See In re Mental Commitment of N.A.L.*, No. 2024AP1195, unpublished slip op. ¶12 (WI App Feb. 5, 2025) App. 3; *In re Mental Commitment of L.A.T.*, No. 2022AP603, unpublished slip op. (WI App Jan. 11, 2023) App. 29; *In re Mental Commitment of N.W.*, No. 2019AP48, unpublished slip op. ¶1 (WI App Aug. 29, 2019) App. 38. It is therefore necessary for this Court to exercise its discretionary authority, accept review, and answer these important Constitutional questions.

CONCLUSION

Dated this 5th day of March, 2025.

Respectfully submitted,

Electronically signed by Will Straube

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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 3,826 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 5th day of March, 2025.

Signed:
Electronically signed by
Will Straube
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Assistant State Public Defender