

**FILED  
03-28-2025  
CLERK OF WISCONSIN  
SUPREME COURT**

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP1443

---

*In the matter of the mental commitment of L.L.:*  
SHEBOYGAN COUNTY,

Petitioner-Respondent,

v.

L.L.,

Respondent-Appellant-Petitioner.

---

PETITION FOR REVIEW

---

DAVID MALKUS  
Assistant State Public Defender  
State Bar No. 1094027

Office of the State Public Defender  
735 N. Water Street - Suite 912  
Milwaukee, WI 53202-4116  
(414) 227-4805  
malkusd@opd.wi.gov

Attorney for Respondent-Appellant-  
Petitioner

**TABLE OF CONTENTS**

	Page
ISSUES PRESENTED .....	3
CRITERIA FOR REVIEW .....	3
STATEMENT OF FACTS .....	5
ARGUMENT .....	9
I.    The evidence was insufficient regarding dangerousness.....	9
II.   The commitment order should be vacated because the circuit court failed to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment was based. ....	12
A.   General principles of involuntary commitment under Chapter 51.....	12
B.   The circuit court failed to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment was based. ....	13
CONCLUSION.....	20
CERTIFICATION AS TO FORM/LENGTH.....	21
CERTIFICATION AS TO APPENDIX .....	21

## ISSUES PRESENTED

1. Did the County present sufficient evidence to support the commitment order?

The circuit court answered yes.

The court of appeals answered yes.

2. Did the circuit court make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the commitment was based, as required by *Langlade Cnty. v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277?

The circuit court extended the commitment.

The court of appeals answered yes.

## CRITERIA FOR REVIEW

In determining that sufficient evidence of dangerousness existed to extend Lucy's<sup>1</sup> commitment, the court of appeals relied on her prior stipulation to an initial commitment. *State v. L.L.*, No. 2024AP1443, unpublished slip op., ¶ 27 (Wis. Ct. App. Feb. 26, 2025) (App. 16). Specifically, the court of appeals noted that while the County argued that Lucy "would engage in the same dangerous behavior that prompted her

---

<sup>1</sup> A pseudonym for the respondent-appellant-petitioner, L.L.

initial detention” without an extension of the commitment, the County conceded that it failed to introduce any admissible evidence of this behavior. *Id.*, ¶ 26 (App. 16). The court of appeals held that this oversight was not important because Lucy’s stipulation to her initial commitment included a stipulation “that there [was] sufficient evidence for the court’ to conclude that she was dangerous.” *Id.*, ¶ 27 (App. 16-17). However, the court of appeals did not identify any legal authority that permits a finding of sufficient evidence for a recommitment based on an individual’s prior stipulation to an initial commitment.

Moreover, the court of appeals’ decision is in conflict with past decisions of this Court which have recognized that “[a]n extension requires the County to prove the same elements by clear and convincing evidence” that must be proven at an initial commitment hearing. *Portage Cnty. v. J.W.K.*, 2019 WI 54, ¶ 18, 386 Wis. 2d 672, 927 N.W.2d 50; *see also Waukesha Cnty. v. J.W.J.*, 2017 WI 57, ¶ 20, 375 Wis. 2d 542, 895 N.W.2d 783 (“Upon each petition to extend a term of commitment, a county must establish the same elements with the same quantum of proof.”). If the County is allowed to prove dangerousness at a recommitment hearing based on an individual’s prior stipulation to an initial commitment, the County is not being held to the same burden of proof at recommitment hearings as in initial commitment hearings. To the contrary, under these circumstances, an individual can be indefinitely recommitted even where sufficient evidence of dangerousness was never once proven via testimonial evidence.

Based on the above, review is warranted because the court of appeals' decision is in tension with prior decisions of this Court. *See* Wis. Stat. § 809.62(1r)(d). Additionally, review is warranted because no published decision squarely addresses whether a court may find sufficient evidence for a commitment extension based on an individual's prior stipulation to an initial commitment. A decision by this Court would therefore develop, clarify, and harmonize the law on a question of law that will have statewide impact. *See* Wis. Stat. § 809.62(1r)(c)2. Finally, this Court should also grant review to address whether the circuit court satisfied *D.J.W.*'s requirement for specific findings because this issue presents a real and significant question of constitutional law concerning Lucy's right to due process. *See* Wis. Stat. § 809.62(1r)(a).

### STATEMENT OF FACTS

The circuit court entered an order on March 10, 2023, committing Lucy to the care and custody of Sheboygan County for a period of six months. (49:1-2). The County subsequently filed a petition to extend the commitment, and the court held a hearing on the recommitment petition on August 29, 2023. (66:1; 103:1; App. 20).

A psychiatrist, Marshall Bales, testified as the sole witness at the recommitment hearing. (103:4; App. 23). Dr. Bales testified that Lucy had a mood disorder and a substance abuse problem, and that she had recently tested positive for marijuana and cocaine. (103:7-8; App. 26-27). According to Dr. Bales, Lucy's

substance abuse interfered with her mental health treatment because “the first step in treating her mood disorder is to help her be clean from street drugs and alcohol.” (103:8; App. 27). He also said Lucy had a history of running away from home, and that she would not take her medications when she ran away from home. (103:10; App. 29). Dr. Bales testified that Lucy had recently been placed at the Winnebago Mental Health Institute. (103:5; App. 24)

In regards to dangerousness, Dr. Bales testified that Lucy “had made suicidal threats leading to the current return to [a] more restrictive [placement].” (103:9; App. 28). Defense counsel objected that this statement was based on hearsay, but the circuit court allowed the statement on the grounds that it supported the doctor’s underlying opinions. (103:9-10; App. 28-29).<sup>2</sup> Dr. Bales then stated that Lucy told him she “may” have made suicidal threats, but on cross he testified that she “disputed that she was suicidal leading to the current inpatient state.” (103:10, 13; App. 29, 32).

The circuit court granted the County’s request for a 12-month extension of the commitment. (103:19; App. 38). In support of its decision, the court stated the following:

[Lucy] suffers from a mental illness but that --  
that’s compounded by her drug use and -- and

---

<sup>2</sup> Counsel also objected to similar hearsay included in Dr. Bales’ written report to the court, and the court overruled this objection based on the same rationale. (103:15; App. 34).

potentially by the fact of -- that she's not even 18 years old yet and does not have -- she's not an adult. Her brain is not developed. I do find, at this point, that there are grounds for the extension of commitment, that she is mentally ill, specifically that she suffers from mood disorder but also that she's drug dependent.

And that is a ground that can be used for -- for this commitment as well, and that was testified to and indicated in Dr. Bales's report. That ***her mental illness and drug dependency creates a substantial probability of harm to herself*** and that, even recently, she is using cocaine, marijuana, and, from one of the reports, it appears that potentially meth. And that these -- the use of ***these substances can cause serious injury, serious physical debilitation, it could also -- they could also cause death***. And I do believe that she's in need of treatment. Again, that she's recently been in use of illicit substances, that she's recently ran away, that when she has run away, that she has not been receiving treatment that she needs. I also believe that there's been shown today that there's a substantial likelihood that -- based on her record -- that she would be a proper subject for commitment if she were not receiving treatment that she needs.

(103:18-19; App. 37-38) (emphasis added).

The court subsequently entered a written order of extension of commitment. (86:1; App. 18). The order stated that Lucy was mentally ill but not drug dependent. (86:1; App. 18).

Lucy appealed, and the court of appeals affirmed. *L.L.*, No. 2024AP1443, ¶ 1 (App. 4). The court concluded that sufficient evidence supported the recommitment based on the following:

Even if the circuit court erred to the extent that it considered Bales' statements about Lucy's suicidal threats at the extension hearing, Lucy's earlier stipulation that she made those statements remains part of the record and would provide a sufficient basis for the circuit court to find that the threats were made. In addition to the stipulation, Bales testified that if Lucy's treatment were withdrawn, she would likely not continue it voluntarily. That, in Bales' view, could lead to a possible relapse in her drug use and would likely cause her mood disorder symptoms to worsen. Bales agreed that her worsening symptoms would cause her to 'become potentially suicidal in the future.' This testimony, along with the stipulation and Bales' report, establish a substantial probability that Lucy would become a danger to herself if her involuntary treatment were discontinued.

*Id.*, ¶ 28 (App. 17).

In regards to whether the circuit court satisfied *D.J.W.*'s requirement for specific findings, the court of appeals stated the following:

Under [Wis. Stat. § 51.20(1)(am)], the court was not obliged to make findings of fact regarding recent threats of harm. Instead, the court could—and did—make findings regarding Lucy's treatment history and the likelihood that she

would become dangerous if her commitment lapsed. The court found that Lucy's mental illness and history of illegal drug use 'create[d] a substantial probability' of self-harm because the drugs she had used could cause 'serious injury, serious physical debilitation,' or death. The court further found that in addition to her recent drug use, Lucy had recently run away and, during that time, had 'not been receiving treatment that she needs.' After making these findings about her history, the court concluded that the County had carried its burden under the alternative standard to show 'that there's a substantial likelihood that—based on her record—that she would be a proper subject for commitment if she were not receiving treatment that she needs.' The court's findings engaged with the evidentiary record and referenced specific phrases from both [Wis. Stat. 51.20(1)(a)2.a.] and the § 51.20(1)(am) alternative.

*Id.*, ¶ 24 (App. 14-15).

## ARGUMENT

### **I. The evidence was insufficient regarding dangerousness.**

As an initial matter, allegations that Lucy made recent suicidal threats are inadmissible because these allegations largely came in the form of hearsay from Dr. Bales. The circuit court admitted this hearsay on the grounds that it supported the doctor's underlying opinions, but this rationale misreads the legal standard for admitting hearsay from an expert. Under

Wis. Stat. § 907.03, an expert may rely on otherwise inadmissible evidence such as hearsay if the evidence is of the type experts typically rely on to form their opinions. Nonetheless, “although Wis. Stat. § 907.03 allows an expert to base an opinion on hearsay, it *does not transform the hearsay into admissible evidence.*” *Walworth Cnty. v. Therese B.*, 2003 WI App 223, ¶ 8, 267 Wis. 2d 310, 671 N.W.2d 377 (emphasis added). Thus, while Dr. Bales was allowed to consider hearsay in forming his opinions, he could not testify that Lucy made suicidal threats in the past based on reports he had reviewed.<sup>3</sup>

Setting aside the inadmissible hearsay presented at the hearing, the County failed to provide sufficient evidence regarding dangerousness. The remaining evidence primarily consisted of testimony regarding Lucy’s use of drugs along with Dr. Bales’ opinion that “the first step in treating her mood disorder is to help her be clean from street drugs and alcohol.” (103:8; App. 27). But this opinion was insufficient to prove dangerousness in two respects. First, there was no specific testimony regarding the frequency and duration of Lucy’s drug use. (103:4-15; App. 23-34). Thus, there was no admissible evidence presented that Lucy’s drug use by itself rendered her unable to satisfy her basic needs for nourishment, medical care, shelter or safety such that a substantial

---

<sup>3</sup> Although Dr. Bales also testified that Lucy told him she “may” have made suicidal threats, he did not testify that she had actually admitted to making any suicidal threats. (103:10; App. 29).

probability existed of imminent death, serious physical injury, serious physical debilitation, or serious physical disease. *See* Wis. Stat. § 51.20(1)(a)2.d. Second, setting aside the inadmissible hearsay regarding threats, there was no evidence presented that Lucy's substance use interfered with her mood disorder treatment to such an extent that it made her a danger to herself or others. *See* Wis. Stat. § 51.20(1)(a)2.a. and b. Consequently, the County failed to provide sufficient evidence of dangerousness.

In affirming the circuit court, the court of appeals relied on Lucy's prior stipulation to an initial commitment because it included a stipulation "that there [was] sufficient evidence for the court' to conclude that she was dangerous." *Id.*, ¶ 27 (App. 16). But this reasoning conflicts with past decisions of this Court which have recognized that "[a]n extension requires the County to prove the same elements by clear and convincing evidence" that must be proven in at initial commitment hearing. *J.W.K.*, 2019 WI 54, ¶ 18; *see also J.W.J.*, 2017 WI 57, ¶ 20 ("Upon each petition to extend a term of commitment, a county must establish the same elements with the same quantum of proof.").

If the County is allowed to prove dangerousness at a recommitment hearing based on an individual's prior stipulation to an initial commitment, the County is not being held to the same burden of proof at recommitment hearings as in initial commitment hearings. To the contrary, under these circumstances, an individual can be indefinitely recommitted even

where sufficient evidence of dangerousness was never once proven via testimonial evidence. Because this would violate the requirement that a recommitment requires proof of the same elements by the same burden of proof as an initial commitment, Lucy's prior stipulation did not provide a basis on which to extend her commitment.

Based on the foregoing, the County's evidence regarding dangerousness was insufficient. This Court should therefore reverse the extension of commitment order.

**II. The commitment order should be vacated because the circuit court failed to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment was based.**

A. General principles of involuntary commitment under Chapter 51.

To involuntarily commit a person under Chapter 51, the County must prove three elements: that the person is mentally ill, a proper subject for treatment, and dangerous. Wis. Stat. § 51.20(1). At the impending expiration of an initial six-month commitment order, the County may seek an extension of the order for up to 12 months. Wis. Stat. § 51.20(13)(g). The County must prove the same three elements in order to recommit an individual. *J.W.J.*, 2017 WI 57, ¶ 20. The County must prove these elements by clear and convincing evidence. Wis. Stat. § 51.20(13)(e).

- B. The circuit court failed to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment was based.

Wisconsin law provides five different definitions for “dangerous.” *See* Wis. Stat. § 51.20(1)(a)2.a.-e. Specifically, a person is dangerous if he or she does any of the following:

- a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats or attempts at suicide or serious bodily harm.
- b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm. . . .
- c. Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals. . . .
- d. Evidences behavior manifested by recent acts or omission that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical

injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. . . .

e. For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantage of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. . . .

Wis. Stat. § 51.20(1)(a)2.a.-e.

A “substantial probability” as set forth in Chapter 51 means “much more likely than not.” *See*

*State v. Curiel*, 227 Wis. 2d 389, 414, 597 N.W.2d 697 (1999).

Regarding the different dangerousness standards set forth in Wis. Stat. § 51.20(1)(a)2., this Court held in *D.J.W.* that it would henceforth require circuit courts in recommitment proceedings “to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based.” *D.J.W.*, 2020 WI 41, ¶ 40. Thus, as the court of appeals has explained, “*D.J.W.* requires a circuit court to provide **both** the applicable subdivision paragraph **and** specific factual findings to support a recommitment decision.” *Ozaukee Cnty. v. J.D.A.*, No. 2021AP1148, unpublished slip op., ¶ 25 (WI App Dec. 15, 2021) (App. 52) (emphasis in original).

Providing both specific factual findings and the applicable subdivision paragraph serves two purposes. First, doing so provides clarity and extra protection to patients regarding the underlying basis for a recommitment. *D.J.W.*, 2020 WI 41, ¶¶ 42-43. In this respect, this Court noted that 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.” *Id.*, ¶ 42 (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)). “Freedom from physical restraint,” the court explained, “is a fundamental right that ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.’” *Id.* (quoting *State v. Post*, 197

Wis. 2d 279, 302, 541 N.W.2d 115 (1995)). Given the importance of the liberty interest at stake, the court stated that the accompanying protections should mirror the serious nature of the proceedings. *Id.*, ¶ 43.

Second, this Court stated that the 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 thereby ensure the soundness of judicial decision-making, especially with respect to challenges based on the sufficiency of the evidence. *Id.*, ¶ 44. “A more substantial record will better equip appellate courts to do their job,” the court noted, “further ensuring meaningful appellate review of the evidence presented in recommitment proceedings.” *Id.*

The circuit court therefore needed to provide both specific factual findings and the applicable subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. to support its recommitment decision. However, the court provided neither specific factual findings nor a reference to the appropriate subdivision paragraph when it stated the following:

[H]er mental illness and drug dependency creates a substantial probability of harm to herself and that, even recently, she is using cocaine, marijuana, and, from one of the reports, it appears that potentially meth. And that these -- the use of these substances can cause serious injury, serious physical debilitation, it could also -- they could also cause death. And I do believe that she's in need of treatment. Again, that she's recently been

in use of illicit substances, that she's recently ran away, that when she has run away, that she has not been receiving treatment that she needs.

(103:19; App. 38).

The above statement fails to comply with *D.J.W.* because it does not reference a subdivision paragraph of Wis. Stat. § 51.20(1)(a)2.<sup>4</sup> Moreover, it is not clear which dangerousness standard the circuit court believed actually applied. The court's reference to "a substantial probability of harm" to Lucy partially tracks with the first standard of dangerousness, but this standard also requires evidence of recent threats of or attempts at suicide or serious bodily harm. *See* Wis. Stat. § 51.20(1)(a)2.a. Contrary to this standard, the court made no factual findings whatsoever regarding Lucy's alleged threats of self-harm. (103:18-19; App. 37-38). Instead, the court merely noted Lucy's use of controlled substances, but use of controlled substances by itself is not an attempt or threat at suicide or serious bodily harm.

Similarly, the circuit court's reference to "serious injury, serious physical debilitation, [and] death" partially tracks with the fourth standard of dangerousness. *See* Wis. Stat. § 51.20(1)(a)2.d. But this standard also requires evidence that a person is

---

<sup>4</sup> The court also referenced the recommitment standard, but simply referencing the recommitment standard is insufficient because the court failed to link that standard to any of the five dangerousness criteria in Wis. Stat. § 51.20(1)(a)2. (103:19; App. 38). *See D.J.W.*, 2020 WI 41, ¶¶ 3, 32-34.

unable to satisfy her basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment. *Id.* Contrary to this standard, the court made no reference to basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment, and it also made no factual findings in regards to that portion of the standard. (103:18-19; App. 37-38).

Furthermore, the circuit court's written order compounds the lack of sufficient findings in its oral ruling because the order states that Lucy was mentally ill but *not* drug dependent. (86:1; App. 18). This finding contradicts the court's oral ruling in which it indicated that it was recommitting Lucy based on both a mental illness and a drug dependency. (103:18-19; App. 37-38). Thus, in light of the testimony presented at the hearing, the lack of specific factual findings by the court, and the court's written order, it is not clear whether the commitment was based on testimony about Lucy's alleged threats of self-harm or her alleged drug dependency.

Accordingly, the circuit court failed to comply with the mandate issued in *D.J.W.* such that the commitment order is legally erroneous and should be vacated. Again, because the court failed to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment was based, its decision was vague and unclear. That lack of clarity is inconsistent with the minimal level of due process protection necessary to ensure that Lucy's commitment is based

on sufficient evidence and that she has a meaningful right to appeal. *See D.J.W.*, 2020 WI 41, ¶¶ 42-44. Lucy's commitment should therefore be vacated.

Finally, outright reversal of the extension of commitment order is the appropriate remedy for the circuit court's error rather than a remand for the court to comply with *D.J.W.* *See Sheboygan Cnty. v. M.W.*, 2022 WI 40, ¶ 38, 402 Wis. 2d 1, 974 N.W.2d 733. Though the court held a hearing on the extension of Lucy's commitment prior to the expiration of the previous commitment order, the court failed to comply with its obligations under *D.J.W.* during the hearing, and thus failed to enter a valid order. At this point, the prior commitment that Lucy was under has long since expired and, as a result, the circuit court now lacks competency to conduct further proceedings on the County's petition for an extension of the commitment. *See id.*

## CONCLUSION

For the reasons stated above, Lucy asks this Court to grant review, reverse the decision of the court of appeals, and vacate the circuit court's extension of commitment order.

Dated this 28<sup>th</sup> day of March, 2025.

Respectfully submitted,

*Electronically signed by*  
*David Malkus*

DAVID MALKUS

Assistant State Public Defender

State Bar No. 1094027

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

malkusd@opd.wi.gov

Attorney for Respondent-Appellant-  
Petitioner

### **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 3,917 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 28<sup>th</sup> day of March, 2025.

Signed:

*Electronically signed by*

*David Malkus*

DAVID MALKUS

Assistant State Public Defender