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July 8, 2022

Ms. Sheila T. Reiff
Wisconsin Supreme Court Clerk
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: *Milwaukee County v. K.M.*, Appeal No. 2019AP1166

Dear Ms. Reiff:

I am filing this letter in response to the supreme court's recent order requiring the parties to submit simultaneous letter briefs by July 8th discussing the impact, if any, of *Sauk County v. S.A.M.*, 2022 WI 46, __ Wis. 2d __, 975 N.W.2d 162 on the issues raised in "Kristin's" petition for review.

This case involves an appeal from an expired recommitment order. The court of appeals held that the appeal was moot and dismissed it without addressing the merits.

Kristin's petition for review presented three issues:

1. Whether the circuit court recommitted her in violation of her 14th Amendment procedural due process rights to be physically present, to meaningfully participate in her hearing, and to receive a decision stating the evidence and the basis for her recommitment.

2. Whether the circuit court committed plain error when it admitted hearsay evidence on the issue of her alleged dangerousness.

3. Whether the issues for review satisfy exceptions to the mootness doctrine and/or this appeal presents a live controversy.

The supreme court stayed Kristin's petition for review pending its decision in *S.A.M.*, which decided three issues. First, *S.A.M.* held that "an appeal of an expired recommitment order is not moot because vacating the order would still have practical effects on two of the order's collateral consequences—the ability to restore a constitutional right and liability for the cost of care received while subject to the recommitment order." *S.A.M.*, ¶27.

Second, *S.A.M.* rejected the individual's argument that he had a due process right to pre-trial notice of the standard of dangerousness that the county planned to prove at the recommitment trial. It did so because the individual relied solely on *Langlade County v.*

D.J.W., 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. And *D.J.W.* does not support that argument: *S.A.M.*, ¶29.

Third, *S.A.M.* rejected the individual's claim that the county offered insufficient evidence to support his recommitment. *S.A.M.*, ¶36.

S.A.M. does not address or resolve the first two issues presented in Kirstin's petition for review. However, it is dispositive of the third issue for review. *S.A.M.* clearly holds that an appeal from an expired recommitment order is not moot due to the order's effects on the individual's firearm rights and liability for cost of care. Therefore, Kristin's appeal must be decided on the merits.

Even if the recommitment order carried no collateral consequences, the first issue for review, at a minimum, simultaneously satisfies exceptions to the mootness doctrine and §809.62's criteria for supreme court review. It is a constitutional issue of great public importance. It will affect commitment and recommitment proceedings throughout the state. It is recurring. And several court of appeals opinions, some of them published, contain language that conflicts with United States Supreme Court precedent: *Vitek v. Jones*, 445 U.S. 480 (1980).

Briefly, *Vitek* established the minimum due process rights for persons subject to commitment proceedings. Three years ago, the supreme court assumed, but explicitly did not decide, that a person undergoing commitment is entitled to "the full complement of due process guarantees." *Waukesha County v. S.L.L.*, 2019 WI 66, ¶33, 387 Wis. 2d 333, 929 N.W.2d 140. The supreme court still has not recognized that the due process rights listed in *Vitek* apply to Chapter 51 commitment proceedings. Nor has the supreme court established the procedure for obtaining the individual's waiver of these due process rights.

One of the 14th Amendment rights recognized in *Vitek* is the right to be heard in person. Kristin contends that she was denied this right, and the circuit court took no steps to determine whether she had waived it. (Petition 7-8, 16-17). This constitutional issue is recurring. In addition to Kristin's case, it has arisen in one form or another in at least three other cases—*S.L.L.*, this case, *Price County D.H & H.S. v. Sondra F.*, Appeal No. 2013AP2790, (Wis. Ct. App. May 28, 2014)(unpublished)(App.132), and *Waukesha County v. W.E.L.*, Appeal No. 2018AP1486 (Wis. Ct. App. May 15, 2019) (unpublished)(App.137).

Another 14th Amendment right recognized by *Vitek* is the right to confront and cross-examine witnesses. Kristin's absence from her recommitment hearing prevented her from exercising this right. Indeed, her lawyer declined to cross-examine the County's sole testifying doctor. (App. 129).

Two published and at least one unpublished court of appeals opinions hold that a person undergoing a Chapter 51 commitment has no 14th Amendment right to confront and cross examine witnesses. *See W.J.C. v. County of Vilas*, 124 Wis. 2d 238, 240, 369 N.W.2d 162 (Ct. App. 1985*); Walworth County v. Therese B.*, 2003 WI App 223, ¶10, 267 Wis. 2d 310, 671 N.W.2d 377; and *Sondra F.*, ¶18.

Only the supreme court can overrule, modify or withdraw language from a court of appeals opinion *Cook v. Cook*, 208 Wis. 2d 166, ¶55, 560 N.W.2d 246 (1997). Thus, only the supreme court can resolve the conflict between these court of appeals' opinions and *Vitek*.

For the reasons stated above and the additional reasons argued in Kristin's petition, the supreme court should grant review in this case.

Sincerely,

Colleen Ball

Attorney Colleen D. Ball