STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP000426-CR

In the matter of the mental commitment of T.L.T.:

MILWAUKEE COUNTY,

Petitioner-Respondent,

v.

T.L.T.,

Respondent-Appellant-Petitioner.

RESPONSE TO THE PETITION FOR REVIEW

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Milwaukee County respectfully submits this response to the petition for review filed by T.L.T. pursuant to Wis. Stat. § 809.62(3), and as directed by the Court on October 18, 2021. The petition for review should be denied. It fails to satisfy the criteria, set forth in Wis. Stat. § 809.62(1r), that this Court consistently uses to guide its discretion in determining whether to grant review.

The Court should not review this case where it is a moot issue that fails to overcome the heavy presumption of mootness and the issue presents nothing more than the application of a statute, Chapter 51 of the Wisconsin Statutes, to a set of factual circumstances involving petitioner T.L.T. The issue presented is neither a significant nor novel question of law. The appellate court properly dismissed this case as moot, as "another decision by this court on this issue would have no more impact than our existing decision." *Milwaukee County v. T.L.T.*, Appeal No. 2020AP000426, ¶¶8-9 unpublished slip op. (Wis. Ct. App. May 18, 2021). Moreover, the circuit court correctly found it had the authority to disregard any errors in the proceedings that did not substantially affect any party—in this case, trial counsel's allegation that she did not have

access to the non-required doctors' reports more than 48 hours in advance of the scheduled date. Wis. Stat. §§ 51.20(10)(b) and (c). As such, reviewing the appellate court's decision and/or remanding for a substantive decision is not appropriate nor is it warranted.

STATEMENT OF THE CASE

In its response to a petition for review, the County may include any perceived misstatements of facts or law set forth in the petition that have a bearing on the question of what issues properly would be before the Court if the petition were granted. As such, the County raises the following issues with T.L.T.'s presentation of the statement of the case.

T.L.T. wrongly and summarily characterizes trial counsel's assertion that she did not have access to the reports as an "uncontradicted offer of proof." (Petition for Review ("Pet. Rev.") at 1). The County disagrees with both the assertion that T.L.T.'s statement was uncontradicted and that she did not have access to the reports. At the circuit court level, the County filed two affidavits along with its motion to dismiss noting that the reports were accessible in the probate court office at least 48 hours prior to the hearing. (R:79, R:80). It is unreasonable for T.L.T. to

continually assert that trial counsel's offer of proof was uncontradicted.

What's more, as the County has repeatedly demonstrated, trial counsel *did* have access to the reports, but trial counsel failed to do anything more than rely on her email. Relying solely on email is contradicted by the e-filing rules for these types of documents. The e-filing rules provide that the clerk of courts shall provide paper copies of the court record. Wis. Stat. §§ 801.18(f), (g). While mandatory users are required to file documents via e-filing, the examiners are not mandatory e-filers. Wis. Stat. § 801.18(3)(a). Trial counsel did not dispute that she failed to consult with the circuit court regarding the accessibility of the reports either by physically consulting the actual file in probate court or by contacting the circuit court to see if the reports were available for review. Thus, T.L.T. is mistaken on two factual fronts: trial counsel's assertions were not uncontradicted, and trial counsel did have access to the reports.

The County would be remiss not to mention T.L.T.'s bold declarations that this is a "recurring" and "significant legal issue" that involved a "contentious legal dispute" as unfounded, and are, as the County perceives it, a misstatement of fact. T.L.T. believes

that this issue is persistent because of the unpublished decision in *Matter of Commitment of S.N.W.*, 2020 WI App 47, 2020 WL 3260732–which this Court recently dismissed as improvidently granted–and because almost three years ago, a circuit court judge made an off-the-cuff statement, unsupported by actual facts, numbers, or data, that this wasn't the first time there was an issue with e-filing. If it were such a prevailing issue, between the seventy-two counties in Wisconsin and the span of three years, there would surely be more than one demonstrated instance of a similar issue. (Contrast this to an actual issue that is recurring: reversals or remands for failure to comply with *Matter of Commitment of D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277.[1]) Given the lack of factual support, it is unreasonable to continually assert that this is a recurring issue.

CRITERIA FOR REVIEW

None of the issues raised by T.L.T. in her petition warrant review by this Court nor remand to the appellate court for a substantive decision. First, the issue presented by T.L.T. will have

[1] By this counsel's count, the following appellate cases have applied *D.J.W.* in **10 cases in the last 12 months** and either reversed or remanded: 2021AP581, 2021AP244, 20AP2014-FT, 20AP1954-FT, 21AP6 (petition for review granted on 9/14/21), 21AP324, 21AP223, 20AP1580, 20AP1954-FT, and 20AP961.

no practical effect and, contrary to T.L.T.'s contention, this is not an issue that overcomes the mootness doctrine. Second, despite T.L.T.'s attempts, she cannot revive issues that were conceded and/or waived by trial counsel. When trial counsel fails to effectively raise the issue, the issue is waived on appeal. Wis. Stat. § 805.11(1); Wis. Stat. §§ 805.11(2) and (3); *Matter of Commitment of S.L.L.,* 2019 WI 66, ¶42, 387 Wis.2d 333, 929 N.W.2d 140. Lastly, T.L.T. cannot meet the criteria for review.

Tellingly, T.L.T. cites to no specific provisions for which she believes this case meets the criteria for review. Wis. Stat. § 809.62(1r). T.L.T. states multiple times that this was a significant issue at the circuit court level but fails to present any tangible data or reasoning to demonstrate the significance this case presents. In all events, this issue is neither special nor important. *Id.* The issue presented in this case involves the clear and direct application of Chapter 51, specifically, Wis. Stat. §§ 51.20(9), 51.20(10)(b) and (c). As such, this presents no opportunity for the Court to develop the law, as is the Court's practice. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 255 (1977) ("the supreme court's primary function is that of law defining and law development").

ARGUMENT

I. THE COURT'S ESTABLISHED CRITERIA DO NOT SUPPORT REVIEW OF THE COURT OF APPEALS' DECISION.

A. The Appellate Court Properly Dismissed This Appeal as Moot.

The appellate court properly dismissed T.L.T.'s appeal when it concluded she failed to meet any of the exceptions to the mootness doctrine. *Milwaukee County v. T.L.T.*, Appeal No. 2020AP000426, ¶¶6-11. *See Matter of Commitment of S.L.L.*, 2019 WI 66, ¶40, 387 Wis. 2d 333, 929 N.W.2d 140; *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶¶11-12, 386 Wis. 2d 672, 927 N.W.2d 509 (citation omitted); *State v. Leitner*, 2002 WI 77, ¶13, 253 Wis. 2d 449, 646N.W.2d 341. While there are certain circumstances where the appellate court will review moot issues, T.L.T. has not demonstrated that she has met any of these specific circumstances. The five specific circumstances when an appellate court may take up an otherwise moot issue are:

> (1) where the issues are of great public importance;
> (2) where the constitutionality of a statute is involved;
> (3) where the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts;
> (4) where the issue is likely to arise again and should be resolved by the court to avoid uncertainty;

> (5) or where a question was capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within the time that would have a practical effect upon the parties.

Leiter, 2002 WI 77, ¶14 (numbers added, internal citations omitted).

In its decision, the appellate court correctly determined that T.L.T. failed to overcome the mootness of her long-expired recommitment order. (*Milwaukee County v. T.L.T.*, Appeal No. 2020AP000426, ¶¶8-9). Supporting its decision, the appellate court determined 1) further clarification is unwarranted given an existing decision addressing the application of Wis. Stat. § 51.20(10)(b), *Fond du Lac County v. S.N.W.,* (*Id.,* ¶9); 2) decision on the sufficiency of the evidence, as T.L.T. requested, "to support a three-year-old, expired recommitment order that itself has been replaced by another expired order is not of great public importance, would not be essential to guide further courts, and is unlikely to arise again" (*Id.,* ¶10); and, 3) a decision on this case could lead to no further clarification of the recent decision in *D.J.W. See Matter of Commitment of D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277; *Milwaukee County v. T.L.T.*, Appeal No. 2020AP000426, ¶¶10-11. The appellate court correctly concluded

that this issue is moot. This Court should also decline to review T.L.T.'s appeal as it fails to overcome the mootness doctrine.

B. The Issues Presented Were Waived by Trial Counsel

In the present case and upon review of the transcript, counsel for T.L.T. did not raise an objection with respect to the sufficiency of the evidence. She cannot raise the issue now on appeal. To avoid wavier of an issue, the trial attorney must lodge their objection contemporaneously with the error. See Wis. Stat. § 805.11(1); *S.L.L.*, 2019 WI 66, ¶42. Further, objections must be specific to the claim of error, and there are no exceptions to this requirement. *See* Wis. Stat. §§ 805.11(2), (3).

There were two key points that trial counsel conceded or waived in this instance that render this Court unable to proceed: conceding that Wis. Stat. § 51.20(9) does not apply to recommitment hearings and waiving argument to the sufficiency of the evidence at the recommitment hearing. First, in the motion hearing, trial counsel conceded that the filing of two doctors' reports in a *recommitment* hearing does not apply to T.L.T., unlike the requirement for two doctors' reports for an *original* commitment required by Wis. Stat. § 51.20(9). As a recent

unpublished decision noted, "Wis. Stat. § 51.20(10)(b) [the requirement that the Wis. Stat. § 51.20(9) doctors' reports be filed 48-hours in advance of the hearing] does not affect the court's competency to exercise jurisdiction." *Matter of Commitment of S.N.W.*, 2020 WI App 47, ¶7, 2020 WL 3260732 (unpublished). This would be especially true in an extension case, like T.L.T.'s, where there is no statutory mandate to appoint evaluators under Wis. Stat. § 51.20(9). Thus, when trial counsel conceded that Wis. Stat. § 51.20(9) does not apply in T.L.T.'s case and did not offer an objection to the circuit court proceeding under Wis. Stat. § 51.20(10)(c), the issue of whether Wis. Stat. § 51.20(10)(b) is an applicable statutory mandate should not be addressed here. *See* Wis. Stat. § 805.11(1); Wis. Stat. §§ 805.11(2), (3); *S.L.L.*, 2019 WI 66, ¶42. Second, in closing arguments, counsel did not assert that the County did not meet its burden, but instead simply stated she moved to dismiss without any further argument. (112:13). Because the sufficiency of the evidence challenge was not preserved by a specific argument that the County did not meet its burden, it should not be addressed here. Wis. Stat. §§ 805.11(2) and (3); *S.L.L.*, 2019 WI 66, ¶42.

Because these issues have either been conceded or waived, this Court should not further address T.L.T.'s claims. *See* Wis. Stat. §§ 805.11(2) and (3).

C. T.L.T. Cannot Meet this Court's Criteria Governing Petitions for Review

Wishing to come within the Court's criteria for review, T.L.T. promotes this case as one posing a "significant legal issue," (Pet. Rev. at 3), but T.L.T. fails to provide or establish any criteria for which she could meet the standards for review. At no point has T.L.T. demonstrated a substantial impact on her rights; thus, the Court of Appeals properly rejected T.L.T.'s claim when it determined the issue was moot. There is nothing so unique about this case as to justify a review by the Wisconsin Supreme Court under § 809.62(1r), especially in light this Court's recent declination to issue a decision in *S.N.W.* [2]

A conclusory statement that this issue is a "significant legal issue" does not automatically elevate T.L.T.'s arguments to the level required to meet the criteria for review. Nor can T.L.T.

[2] This case is differentiated from *S.N.W.*, such that in S.N.W.'s original commitment the doctors' reports were required by Wis. Stat. § 51.20(9), but in T.L.T.'s recommitment, the doctors' reports were not mandatory. Clearly, if this Court ultimately declined to issue a decision in a case with mandatory doctor's reports, a case with non-mandatory reports should not rise to a level of warranting review.

demonstrate otherwise. For instance, if T.L.T. raised the issue of the first criteria, a real and significant question of federal or state constitutional law, she must show that the statute is "so vague and standardless that it leaves the public uncertain as the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966); *Commitment of Dennis H.*, 2002 WI 104, ¶16-17, 255 Wis. 2d 359, 647 NW.2d 851; Wis. Stat. § 809.62(1r)(a). In T.L.T.'s instance, the statute is clear here – "the court **shall**, in every stage of an action, **disregard any error** or defect in the pleadings or proceedings that does not affect the substantial rights of either party."[3] Wis. Stat. § 51.20(10)(c) (emphasis added).

T.L.T. has not and cannot meet this heavy burden. If this issue had been so "significant," it would have passed muster under the mootness doctrine. Because T.L.T. fails to state or demonstrate support for any qualifying criteria for review, she fails to meet this Court's well-established and consistently applied criteria governing petitions for review.

[3] T.L.T. also makes no argument to claim that the statute is unclear.

II. ALTERNATIVE GROUND SUPPORTING THE APPELLATE DECISION

Even if the appellate court had determined the issue was not moot, T.L.T.'s petition would nonetheless have failed appellate review. Wis. Stat. § 809.62(3)(d). While T.LT. attempted to claim Wis. Stat. § 51.20(10)(b) was violated, and therefore the circuit court lost competency, she can only do so by overlooking the entirety of the operative statutory provisions of Wis. Stat. §51.20, specifically Wis. Stat. §§ 51.20(9) and 51.20(10)(b),(c); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

T.L.T. incorrectly asserts Wis. Stat. § 51.20(10)(b) was violated without consideration of the other provisions of Wis. Stat. § 51.20. T.L.T. discounts Wis. Stat. § 51.20(10)(c), which directs the circuit court to disregard any errors or defects in the

proceedings that do not affect the substantial rights of either party. T.L.T. also disregards other provisions within the extension provisions that allow for departures from other statutorily created rules that would otherwise affect a party's substantial rights. *See* Wis. Stat. § 51.20(13)(g)2r and 51.20(10)(a). T.L.T. cannot pick only one statutory provision to hang her hat and disregard the rest, particularly when that *one* is sandwiched in between two other provisions which directly impact it and render her argument invalid. *See Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

Reviewed in the context of *all* Wis. Stat. § 51.20, as courts must, the 48-hour rule provided by Wis. Stat. § 51.20(10)(b) is not "central" to the statutory scheme, and therefore does not implicate competency. *In the Interest of Kywanda F.*, 200 Wis. 2d 26, 32-33, 546 N.W.2d 440 (1996). While failure to comply with statutorily mandated time limits *can* cause a circuit court to lose competency, it is not a *de facto* cause of loss of competency. See *Matter of Commitment of Ryan E.M.*, 2002 WI App 71, 252 Wis.2d 490, 642 N.W.2d 592; *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 328-39, 320 N.W.2d 27 (Ct. App. 1982); *Village of*

Trempealeau v. Mikrut, 2004 WI 79, ¶7, 273 Wis.2d 76, 681 N.W.2d 190.

Although T.L.T. tried to raise this as a due process issue, "due process is flexible and calls for such procedural protections as the particular situation demands." *S.L.L.*, 2019 WI 66, ¶25, citing *Matthews v. Eldrige*, 424 U.S. 319, 334 (1976). Here, no procedural protections were necessary because the reports are not required. Wis. Stat. § 51.20(9), which allows for the appointment of two examiners, is ***not*** incorporated into the recommitment hearing provisions. Wis. Stat. § 51.20(13)(g)(3). Further, Wis. Stat. § 51.20(10)(b) indicates that reports should be accessible 48 hours prior to a *final* hearing, not a *recommitment* hearing. If decided on the merits, the appellate court had sufficient support to find a failure of examiners to file timely reports did not affect the circuit court's competency to exercise jurisdiction when there is no requirement that the circuit court appoint two examiners and no requirement that reports be filed.[4]

[4] However, even if the reports were mandated, as mentioned above, T.L.T.'s trial counsel could have had access in advance of the scheduled hearing and was not prejudiced by arguably gaining access less than 48 hours in advance. The County called neither Dr. Nuttall nor Dr. Rainey at the extension hearing, so neither report was submitted as evidence in the recommitment hearing. T.L.T. also had the ability to obtain her own independent examination, submit that as evidence to the court, call witnesses, testify on her own behalf, and request a jury trial. She elected not to do any of those things at the circuit court level.

III. HOLDING IN ABAYANCE FOR *S.A.M.*

T.L.T.'s request that a decision on her petition to review should be stayed until a decision in *Sauk County v. S.A.M.*, 2019AP1033, should be denied. The substantive issues here fail for the reasons stated in Petitioner-Respondent's brief. If the Court does grant a stay, the County respectfully requests leave of the Court to amend this response after the *S.A.M.* decision is released.

CONCLUSION

For the reasons stated, the petition for review should be denied.

Respectfully submitted,

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October 29, 2021

Ms. Sheila Reiff, Clerk of Supreme Court
P.O. Box 1688
Madison, WI 53701-1688

RE: Milwaukee County v. T.L.T, Appeal No. 2020AP426
Milwaukee County Case No. 13ME1688

Dear Ms. Reiff,

Enclosed please find ten copies of respondent Milwaukee County's Response to the Petition for Review in this case. One copy has also been served on counsel for T.L.T, Attorney Christopher August.

Sincerely,

Lisa M. Procaccio

LISA M. PROCACCIO

cc w/enclosure: Atty. Christopher August
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