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Clerk of the Supreme Court
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Re: *Ozaukee Cnty. v. J.D.A.*
Appeal No. 2021AP001148

Dear Ms. Reiff:

This letter brief is submitted in compliance with the Court's order directing counsel to brief the impacts of *Sheboygan Cnty. v. M.W.* and *Sauk Cnty. v. S.A.M.* on the pending Petition for Review. The Petition for Review raises issues that were not resolved by the majority opinions in *M.W.* and *S.A.M.*, as discussed below.

I. The Impact of *M.W.* on the issues raised in the Petition for Review.

The parties in *M.W.* raised the question of what the proper remedy for *D.J.W.* error is. *M.W.*, ¶¶3, 26. The *M.W.* majority noted that appellate courts were applying inconsistent remedies for *D.J.W.* error, with some courts automatically reversing and others automatically reversing and remanding for additional circuit court findings. *M.W.*, ¶26.

The *M.W.* majority determined that it was procedurally restricted from fully addressing the question of a proper remedy for *D.J.W.* error because the extension applicant did not petition for cross-review of the appellate court's order reversing the commitment order. *M.W.*, ¶¶5, f.n. 2, 26, f.n. 6. Unable to answer the question of whether automatic reversal was proper, the *M.W.* majority answered the limited question of whether remand was appropriate under the circumstances of the case. *M.W.*, ¶4.

This Petition for Review seeks an answer to the question not answered in *M.W.* Petitioner asks this Court to determine whether the appellate court correctly imposed the remedy of automatic reversal after identifying *D.J.W.* error.¹ As the *M.W.* majority noted, in *D.J.W.* this Court did not indicate what remedy appellate courts should provide after identifying *D.J.W.* error. *M.W.*, ¶2.

The *M.W.* dissent did address the question of whether automatic reversal is an appropriate remedy for *D.J.W.* error. The dissent determined that reviewing courts may not automatically reverse because they must apply the standard of review for circuit court judgments to *D.J.W.* error to determine whether “the commitment is supported by the evidence and the law . . . In addition, the County must be given the opportunity to argue for harmless error. [Emphasis added.]” *M.W.*, ¶65.

The dissent referenced the list of possible dispositions appellate courts may reach when applying the standard of review. *M.W.*, ¶50. Of the available dispositions, this Court has previously “expressed a preference for remanding to the circuit court when confronted with inadequate findings, particularly in family law or domestic relations actions.” *State v. Margaret H.*, 2000 WI 42, ¶38, 234 Wis.2d 606, 610 N.W.2d 475 (2000).²

Petitioner believes that automatic reversal is not a viable remedy for *D.J.W.* error because the proper standard of review would require appellate courts to review the circuit court’s *factual findings* and determine if they satisfy any dangerousness standard. If, upon application of this standard of review, the appellate court determines that the circuit court’s factual findings indicate dangerousness under one or more standards, petitioner further believes that reversal based solely on *D.J.W.* error would not be a proper remedy.

The standard of review identified by the *M.W.* dissent is more forgiving of *D.J.W.* error than the standard of review petitioner advocates for in the Petition for Review. The *M.W.* dissent would require appellate courts identifying *D.J.W.* error to conduct a review of the *evidence*. The standard of review advanced by petitioner would require appellate courts identifying *D.J.W.* error to consider only the circuit court’s *factual findings* and

¹ Petitioner moved for alternative relief in the event this Court’s opinion in *M.W.* favorable answered the question of whether automatic reversal is a viable remedy for *D.J.W.* error. As the *M.W.* majority did not decide whether automatic reversal is a viable remedy, the *M.W.* opinion is not dispositive of this Petition for Review. This Court cannot grant petitioner alternative relief based on *M.W.*

² Petitioner believes this Court may likewise prefer remand in Chapter 51 proceedings because, like family and domestic relations actions, these proceedings impact substantial liberty interests. Additionally, Chapter 51 proceedings are intended to accurately determine whether subjects meet the criteria for commitment so that dangerous individuals receive necessary treatment.

make a threshold determination of whether they are sufficient to establish any dangerousness standard prior to addressing other appellate claims.³

The *M.W.* concurrence stated that some *D.J.W.* errors are more substantial than others, suggesting that the proper remedy for *D.J.W.* error may very well depend on the nature of the error made. *M.W.*, ¶42. The *M.W.* concurrence appears to be suggesting that a wide range of permissible remedies for *D.J.W.* error may be necessary.⁴

Consistent with petitioner's argument that automatic reversal is not a viable remedy for *D.J.W.* error, the *M.W.* dissent found that *D.J.W.* errors are not structural and therefore subject to harmless error review under § 51.20 (10) (c). Structural error is the type of error for which the remedy of automatic reversal is proper. *M.W.*, ¶60.

As the *M.W.* concurrence and dissent appear to collectively indicate, some *D.J.W.* error (though not structural) may still be so substantial that they rise to the level of plain error. *Virgil v. State*, 84 Wis.2d 166, 182, 267 N.W.2d 852 (1978). Substantial *D.J.W.* errors may require the remedy of reversal while others may be deemed harmless.

In all commitment proceedings, 51.20 (10) (c) provides that "court[s] 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." Though the *D.J.W.* requirements are procedural, a circuit court's failure to meet these requirements may implicate the individual's substantial right not to be placed under commitment unless found mentally ill, treatable and dangerous. *Fond du lac Cnty. v. Helen E.F.*, 2012 WI 50, ¶20, 340 Wis.2d 500, 814 N.W.2d 179. If the circuit court's *factual findings* are not sufficient to establish any dangerousness standard, appellate courts may, after review of the findings, have no option but to reverse.

The *M.W.* majority determined that the remedy of remand for the circuit court to make additional factual findings was not possible in that case because "the recommitment order at issue here has expired and as a consequence the circuit court lacks competency to conduct any proceedings on remand." *M.W.*, ¶4. The *M.W.* concurrence clarified that the majority's determination not to remand for the circuit court to make additional factual findings was limited to the situation in which the commitment order on review has expired. *M.W.*, ¶¶40, 43.

³ Chapter 51 proceedings are special proceedings, they are not civil actions. Rather than two individuals battling over pecuniary matters with one merely losing to the other's advantage, the litigants in these special proceedings are endeavoring to separate those in need of commitment from those not in need of commitment. Losing individuals are deprived of substantial liberty interests. In *D.J.W.*, this Court found this loss of liberty to be a very serious matter demanding better circuit court records. *Id.*, at ¶¶42-44.

⁴ A wide, but not unlimited, range of permissible remedies would better facilitate courts' ability to fulfill the *parens patriae* function of Chapter 51 while still protecting subject individuals' substantial rights in these proceedings.

The *M.W.* majority based its competency determination on its prior decisions in *Waukesha Cnty. v. E.J.W.*, 2021 WI 85, 399 Wis.2d 471, 966 N.W.2d 590 and *Portage Cnty. v. J.W.K.*, 2019 WI 54, 386 Wis.2d 672, 927 N.W.2d 509, and on an appellate opinion in *Rock Cnty. v. G.O.T.*, 151 Wis.2d 629, 445 N.W.2d 697 (1989). *M.W.*, ¶¶36-37. Collectively, these opinions provide a somewhat confusing answer to the question of when circuit courts lose competency for purposes of remand.

Both *G.O.T.* and *E.J.W.* involved the denial of a subject individual's request for a jury trial. In *G.O.T.*, an appellate court reversed the circuit court's determination that individuals do not have the right to a jury trial at extension hearings. The appellate court then determined that remand for a jury trial was not possible because competency was lost due to the failure to conduct the jury trial within the statutory deadline for commitment proceedings. *Id.*, at pp. 634-36.

In *E.J.W.*, this Court reversed the lower court's determination that the individual's request for a jury trial was untimely but determined that it could not remand for a jury trial because competency was lost when the commitment order under review expired. *Id.*, at ¶¶39-40 and f.n. 10. Consistent with *G.O.T.*, this Court previously found in *J.W.K.* that "[t]he circuit court must hold a hearing on the petition for extension before the previous order expires or it loses competency to extend the commitment." *Id.*, at ¶20.

Under *J.W.K.*, the circuit court's competency to conduct further proceedings will invariably have been lost by the time an appellate court identifies *D.J.W.* error. As part of any commitment proceeding, Chapter 51 requires circuit courts to make a determination that all elements of commitment have been proven. § 51.20(13)(a)5.

In *J.D.A.*, the extension order on appeal had not expired when the appellate court automatically reversed the commitment order solely due to *D.J.W.* error. Under the holdings in *E.J.W.* and *M.W.*, the appellate court was not prohibited from remanding to the circuit court for additional factual findings. Petitioner's argument, consistent with *J.W.K.* and *G.O.T.*, is that remand is not an available remedy for *D.J.W.* errors because circuit courts will have invariably lost competency to conduct further commitment proceedings by the time an appellate court considers a commitment order on appeal.

It is potentially significant that the *M.W.* majority recited the language of *E.J.W.* as the basis for its competency determination. In using language from *E.J.W.*, as opposed to *J.W.K.*, to describe when competency was lost, it appears that the *M.W.* majority may not view the remedy of remand as a remedy entirely tethered to circuit court competency. Rather it appears that the *M.W.* majority may view remand as an appropriate remedy, under certain circumstances, even when circuit court competency is lost.

In *G.O.T.*, *E.J.W.*, *M.W.* and *J.D.A.*, the circuit court conducted commitment proceedings within the statutory deadline but an appellate court subsequently found the

proceedings inadequate. In *G.O.T.* and *E.J.W.* remand was not possible to fix the error because the error to be remedied was the provision of a jury trial. Jury trials are proceedings, which the circuit courts no longer had competency to conduct.

In *M.W.* and *J.D.A.*, the error was the circuit court's failure to comply with the *D.J.W.* requirements to make specific factual findings regarding which statutory dangerousness standard the subject individual's conduct met and sufficient findings in support of that standard. The *M.W.* majority observed that some appellate courts have determined that when circuit courts do not adequately adjudicate a dangerousness standard, the ensuing commitment order may not be valid. *M.W.*, ¶¶39-30

Competency to make additional findings on remand is, likely without exception, indeed lost. As indicated above, the circuit court's duty to make findings regarding the elements of commitment is part of the commitment proceedings.

In contrast, if the circuit court issued findings clearly establishing dangerousness under one of two standards but it is not clear which standard the circuit court relied on, remand may be appropriate for the sole purpose of seeking clarification of which standard the circuit court entered judgment on. No further proceedings may be necessary for circuit courts to merely provide clarification of language in a valid commitment order. Such error could be viewed as a scrivener's one.

In summary, *D.J.W.* errors that involve circuit court failure to adjudicate the essential elements of a commitment prior to entering a commitment order, though not structural, seriously impact a subject individual's substantial rights. For this reason, petitioner believes the standard of review it proposes is a better one than the one relied on by the *M.W.* dissent.

This Court's imposition of the *D.J.W.* requirements and expression of policy that the requirements serve suggests that the standard of review relied on by the *M.W.* dissent will not be sufficient to adequately remedy some *D.J.W.* errors. To merely examine the *evidence* to determine if it is sufficient to support a commitment order is, at times, to look the other way as circuit courts impose commitment orders restricting a subject individual's liberty interests to make his or own treatment decisions and avoid the forcible administration of medication without any determination that the subject individual is dangerous.

Appellate courts may not simply complete the task assigned to circuit courts in § 51.20(13)(a)5. by making factual findings that the subject individual's conduct meets a dangerousness standard. Whether an element of commitments is met is inextricably dependent on the credibility of the witnesses appearing before the circuit court. Appellate courts are courts of law, not of fact. *Wurtz v. Fleischman*, 97 Wis.2d 100, 107, 293 N.W.2d 155 (1980). Even if appellate courts had the authority to adjudicate the

elements of commitment on appeal, it would be too late to do so within the statutory deadlines.

In the Petition for Review, petitioner also argued that automatic reversal is not an appropriate remedy for *D.J.W.* error resulting from the circuit court's failure to identify and make factual findings regarding the extension applicant's proffered basis of dangerousness. In support, petitioner referenced § 51.20 (15) which grants appellate rights to extension applicants. The facts of *M.W.* did not reach this argument and the *M.W.* opinion has no impact on it.

J.D.A. presents a different, but recurring, type of *D.J.W.* error not evident in most opinions involving *D.J.W.* error. It is one of the array of possible *D.J.W.* errors alluded to by the *M.W.* concurrence. *M.W.*, ¶42. Petitioner argued that the factual findings that the circuit court did make would support commitment on first standard dangerousness though the circuit court did not comply with *D.J.W.* requirements to identify the standard and made specific factual findings regarding it.

This Petition for Review and the dissent's thoroughly-drafted opinion in *M.W.* present a compelling need for this Court to consider whether automatic reversal is an appropriate remedy for *D.J.W.* error and other issues discussed herein. *J.D.A.* is now off of commitment though the appellate court did not determine her suitability for commitment before reversing her commitment order. The dissenting justices and petitioner have all expressed alarm due to the continued danger faced by individuals in need of treatment and society when appellate courts automatically reverse commitment orders after identifying *D.J.W.* error.

This Petition for Review may be the first opportunity this Court has to address automatic reversal as a remedy for *D.J.W.* error and provide clear guidance to appellate courts regarding the proper course of action when *D.J.W.* error is identified. Unlike the facts of *M.W.*, the petitioner appealed the appellate court's reversal of its commitment order. Additionally, petitioner has specifically argued that automatic reversal is not a proper remedy for *D.J.W.* error.

Post *M.W.*, it may be that appellate courts will review *D.J.W.* errors in a manner consistent with the dissent's opinion in *M.W.* Nothing in *M.W.* or other binding precedent prevents them from doing so. Even so, petitioner believes that the welfare of individuals in need of treatment and society is better served by a majority opinion answering important questions left unresolved by the majority in *M.W.* but raised in this Petition for Review.

II. The Impact of *S.A.M.* on the issues raised in the County's Petition for Review.

Like *M.W.*, *S.A.M.* did not resolve the relevant question presented in this Petition for Review. In *S.A.M.*, the subject individual argued that his due process rights were violated because the extension applicant did not identify the dangerousness standard relied on for extension in the application for extension. *S.A.M.*, ¶28.

The petitioner in *S.A.M.* relied on *D.J.W.* to support its proposition that due process required extension applicants to identify the statutory basis for dangerousness in the application for extension. The *S.A.M.* majority found that petitioner's reliance on *D.J.W.* was inadequate support for petitioner's proposition. *S.A.M.*, ¶29.

In the event this Court held that automatic reversal was not an appropriate remedy for *D.J.W.* error in *M.W.*, petitioner argued that this Court should consider extending *D.J.W.* to extension applicants by requiring them to identify the basis of dangerousness they intend to rely on for extension in applications for extension and during extension hearings. Petitioner was concerned that a decision in *M.W.* that automatic reversal was not a viable remedy for *D.J.W.* error would impede enforcement of the important policies advanced by the *D.J.W.* requirements.

Petitioner believes that *D.J.W.* does provide some guidance on this issue. In *D.J.W.*, this Court stated that its newly-established requirements were consistent with due process generally but, more specifically, found that the requirements were "manifest in the language of Wis. Stat. § 51.20(1)(am), which references the dangerousness pathways of § 51.20(1)(a)2." *Id.*, at ¶¶41-42. Petitioner believes that it is similarly manifest in the language of §§ 51.20(13)(g)3. and (17) that extension applicants identify the statutory basis of dangerousness in the application for extension and during the extension hearing.

Extension applicants are required under 51.20 (13)(g)3. to

Twenty-one days prior to expiration of the period of commitment under subd. 1., the department, if the individual is committed to the department, or the county department to which an individual is committed shall file an evaluation of the individual and the recommendation of the department or county department regarding the individual's recommitment with the committing court and provide a copy of the evaluation and recommendation to the individual's counsel and the counsel designated under sub. (4).

Departments are required to prepare other evaluations during the interim period between commitment and extension and extension and subsequent extensions to ensure that individuals continue to meet the criteria for commitment and are receiving least restrictive treatment. § 51.20 (17). The requirement that extension applicants identify the basis for dangerousness is thus inherent in reevaluation requirements under both §

51.20(13)(g)3. and § 51.20(17). This Court's prior precedent has clearly established that no individual cannot be maintained on commitment unless they are dangerous. *Waupaca Cnty. v. K.E.K.*, 2021 WI 9, ¶¶27-28, 395 Wis.2d 460, 954 N.W.2d 366.

To know that an individual remains dangerous requires knowledge that the individual's conduct meets one or more of the dangerousness standards in 51.20 (1)(a)2. If an extension applicant files an evaluation in support of extension without any knowledge of which dangerousness standard supports extension, the applicant would not be acting in good faith.

If this Court were to extend *D.J.W.* to impose requirements on extension applicants, it is likely that future applicants will in some cases fail to meet the requirements. Subject individuals might appeal and demand a remedy for such errors.

This Court has previously determined that due process does not demand specific notice of the basis of dangerousness in extension applications. *Waukesha Cnty. v. S.L.L.*, 2019 WI 66, ¶25, 387 Wis.2d 333, 929 N.W.2d 140. *D.J.W.* errors made by extension applicants are unlikely to impact subject individuals' substantial rights. Such errors would be defects in procedure only and subject to the harmless error analysis of § 51.20 (10) (c).

If this Court accepts review of the issues left unresolved by *M.W.*, petitioner requests this Court to consider accepting the question of notice left unresolved in *S.A.M.* but raised in this Petition for Review. As a participant in this *parens patriae* system, petitioner wishes to advance the interests of justice by facilitating the implementation of the important policies this Court expressed in *D.J.W.* To implement these policies, petitioner believes that clearer procedures are needed to facilitate *D.J.W.* compliance to to resolve the uncertainty evident in the imposition of conflicting remedies for *D.J.W.* error.

Sincerely,



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