ROCK COUNTY, WISCONSIN

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March 2, 2023

Sheila Reiff, Clerk of the Supreme Court
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PO Box 1688
Madison, WI 53701-1688

RE: *Rock County v. H.V.;*
District IV, Appeal No. 2022AP1585; Rock County Case No. 2014 ME 098

To Whom It May Concern:

Rock County submits this response to H.V.'s petition for review, pursuant to Wis. Stat. §809.62(3). Should the Court prefer an expanded response on any of the positions taken, Rock County respectfully requests notice and time to provide such.

H.V. requests review to clarify the rules of evidence during a recommitment hearing. H.V. states appellate courts have been refusing to decide cases on hearsay arguments so the Court should take up this case to provide further guidance. H.V. also argues the Court should take up this matter to limit the role of an examiner's testimony in a recommitment hearing. Rock County contends H.V.'s is a fact specific matter which does not set forth any proper issue for review; the appellate court properly decided this case on its merits and the issues H.V. raises may be resolved with the application of established law.

H.V. claims the rules of evidence in a recommitment hearing are not clear. This is patently untrue. Wis. Stat. § 51.20(10) specifically states, "Except as otherwise provided in this chapter, the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter." That is perfectly clear: the civil rules of evidence are to be followed in Chapter 51 matters. No court has tried to change that standard nor failed to follow the rules of civil procedures. H.V. attempts to narrow the focus to hearsay evidence but hearsay is already accounted for in the rules of civil procedure. H.V. argues that the evidentiary rules are less clear in a recommitment hearing than an original hearing, but Wis. Stat. § 51.20(13)(g)3 states, "Upon application for extension of a commitment..., the court shall proceed under subs. (10)-(13)." Hearings for an original commitment and a recommitment are held to the same standards. *Marathon County v. D.K.*, 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901. Though dangerousness may be proved through an alternative avenue than an original commitment (see *Portage County v. J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509), that does not change the evidence a court may receive as admissible. The evidence submitted in recommitment hearings has been reviewed many times over the past several years by the Court and the standard has remained consistent. (see *Portage County v. J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509; *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277; *Waupaca County v. K.E.K.*, 2021 WI 9, 395 Wis. 2d 460, 954 N.W.2d 366). Additionally, the matter of expert testimony and the potential for hearsay from records was addressed in *S.Y. v. Eau Claire County*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991). Though that was regarding an original commitment, it remains the controlling, appropriate case law for expert testimony in a hearing under Wis. Stat. § 51.20(10) for both an original and re-commitment.

H.V. also argues an expert witness may never testify to the concept of a subject's dangerousness because dangerousness is a legal, not factual, finding. This argument misses the mark. Testimony from an expert witness is not objectionable just because it embraces an ultimate issue. Wis. Stat. § 907.04. *Satterwhite v. Texas*, 486 U.S. 249 (1988) cited by H.V. held the use of testimony regarding future dangerousness was

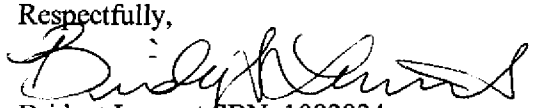
counter to the Sixth Amendment in a specific fact set (capital sentencing proceeding without notice to defense counsel) which is not analogous to the situation here. Though civil commitment cases undoubtedly have significant constitutional stakes, the parallel to a capital sentencing proceeding is far-fetched. In Wisconsin, the Court has reviewed cases involving the use of expert testimony in recommitment hearings and, even when that testimony may require future looking, the Courts have consistently found that, as long as the expert's opinion ties together the subject's treatment history and their current insight or presentation, the testimony is appropriate and useful for the trial court in the ultimate findings and decision given there is a foundational basis for their opinions – even on the issue of dangerousness. *Winnebago County v. S.H.*, 2020 WI App 46, 393 Wis. 2d 511, 947 N.W.2d 761. *S.H.* states:

> "It is also true that proof of the ultimate finding of fact under WIS. STAT. § 51.20(1)(am)—"a substantial likelihood... that the individual would be a proper subject for commitment if treatment were withdrawn"—necessarily requires proof of a substantial likelihood of dangerousness… But neither the statute nor the applicable case law requires an expert or circuit court to speculate on the precise course of an individual's impending decompensation by identifying specific future dangerous acts or omissions the individual might theoretically undertake without treatment... Dangerousness in an extension proceeding can and often must be based on the individual's precommitment behavior, coupled with an expert's informed opinions and predictions (provided, of course, that there is a proper foundation for the latter)." *S.H.*, ¶13

In truth, H.V. appears to wish the Court to take up this matter to further define the word "current" regarding dangerousness in the recommitment standard. The Court defined the term current in *D.J.W. supra.* The recommitment standard is also already clear; a county must prove 1) mental illness, 2) treatability, and 3) dangerousness during both an original and recommitment hearing. *D.K. supra*. If there are concerns about the quality or type of evidence being raised during the trial level, it is up to defense counsel to provide vigorous representation at that time, not to raise issues at the appellate level. If, after zealous advocacy, inappropriate evidence is admitted, the proper recourse is a plain error review as done in *S.Y.* Though H.V. vaguely objected to hearsay during the testimony of Dr. Taylor, H.V. did not cross examine or raise any specific issues with the other evidence admitted including H.V.'s relevant criminal complaint and judgment of conviction – neither of which are hearsay. Had H.V. raised issues in the moment, these issues could have been resolved at the time without the need for appellate intervention. The proper recourse in such matters is an ineffective assistance of counsel proceeding, rather than an appellate relief. *Winnebago County v. J.M.*, 2018 WI 37, 381 Wis. 2d 28, 911 N.W.2d 41. Finally, historically, courts have refused to dictate a specific type of evidence necessary to prove any given matter. There is no reason to deviate from that practice for recommitments.

While additional clarification on the recommitment standard from the Court has been invaluable over the past several years, this case will not add anything to already established case law. The Court of Appeals appropriately analyzed the issues in this matter and resolved them on their merits. The Court of Appeals was not required to address each issue raised by H.V. but that does not mean additional case law would have impacted the decision set forth in its opinion. The issues raised here would only pile on to already established precedent, not adding anything unique. As such, Rock County requests this petition for review be denied.

Respectfully,



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