

No. 20-_____

IN THE
Supreme Court of the United States

J.J.H.,

Petitioner,

v.

WAUKESHA COUNTY,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

COLLEEN D. BALL
Counsel of Record

WISCONSIN STATE
PUBLIC DEFENDER
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov

QUESTION PRESENTED

Whether a deaf person undergoing an involuntary commitment has a due process right to understand and participate in her hearing.

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PETITION FOR WRIT OF CERTIORARI

Petitioner J.J.H. respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Court of Appeals.

OPINIONS BELOW

The Wisconsin Supreme Court's opinion is unpublished but is noted at 2020 WI 22, 390 Wis. 2d 531, 939 N.W.2d 49. (Pet. App. 7a). The Wisconsin Court of Appeals' decision is unpublished. (Pet. App. 1a).

JURISDICTION

The Wisconsin Supreme Court issued an order dismissing its review of the Wisconsin Court of Appeals' decision on February 27, 2020. On March 19, 2020, this Court extended the deadline for any petition for writ of certiorari due after that date to 150 days from the date of the lower court judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law"

The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Chapter 51, Wisconsin's Mental Health Act, authorizes short-term, involuntary mental commitments for 6 to 12 months. Chapter 55, Wisconsin's Protective

Service System, authorizes long-term services for people with incurable disorders.¹ Whether a person is emergently detained under Chapter 51 or Chapter 55, she has both a statutory and a due process right to a probable cause hearing within 72 hours of detention, otherwise the circuit court must dismiss her case.² When the government files a petition for involuntary commitment under the Mental Health Act, the court may, if appropriate, impose a temporary 30-day protective placement and guardianship until a full Chapter 55 hearing can be held. This appeal concerns a 30-day order confining Petitioner J.J.H. at Winnebago Mental Health Institute, Wisconsin's state psychiatric hospital for the acutely mentally ill, pursuant to §51.20(7)(d) and §51.67 of the Mental Health Act.

STATEMENT OF THE CASE

1. On September 12, 2017, Waukesha County filed a three-party petition for the involuntary mental commitment and treatment of J.J.H. (age 18), pursuant to Wis. Stat. §51.20. The county alleged that J.J.H. was deaf, developmentally disabled and suffering from an unspecified mood disorder and anxiety. It further alleged that she had recently become agitated and had made threats to kill her dog and her mother. That very day, J.J.H. allegedly refused to attend school, refused a voluntary admission to a psychiatric hospital, had a tantrum in the car, and threw a water bottle and pencil at her mother. Her mother drove to the police department where the petitioner was arrested for disorderly conduct.

¹ *Fond du Lac County v. Helen E.F.*, 2012 WI 50, ¶13, 340 Wis. 2d 500, 814 N.W.2d.

² *See* Wis. Stat. §§51.20(7)(a) and 55.13(1). *See also Dodge County v. Ryan E.M.*, 2002 WI App 71, ¶5, 252 Wis. 2d 490, 642 N.W.2d 592.

(Pet. App. 70a). The county detained J.J.H. shortly thereafter at 5:36 p.m. (Pet. App. 66a).

On September 13th, the Wisconsin State Public Defender appointed counsel and notified both the court and the county that it wanted to set up an attorney-client meeting by video because J.J.H. was at Winnebago, and she needed two interpreters to communicate. It further requested two interpreters for the probable cause hearing on the 15th. (Pet. App. 74a).

Dr. William Pinkonsly, at Winnebago, filed a generic, half-page “Report of Physician” in support of the county’s petition. The report did not describe any facts about J.J.H. or why she was being detained. It did not indicate her psychiatric diagnosis, her hearing impairment, or her developmental disability. It did not note whether interpreters were present for her mental examination. It did not recommend an involuntary mental commitment under §51.20. It simply stated that “the subject” met the statutory criteria for temporary guardianship, protective placement, and protective services, needed therapeutic medication or treatment, and required locked inpatient psychiatric care. It also included a generic statement that “the subject” met the statutory requirements for involuntary medication or treatment. (Pet. App. 75a).

On September 14th at 5:10 p.m., a court clerk informed defense counsel that she could not find interpreters for the probable cause hearing the next day. (Pet. App. 64a-65a). At noon on September 15th, a circuit court commissioner began the probable cause hearing. The court noted the lack of interpreters and asked defense counsel if she was requesting an adjournment of the 72-hour period for holding the hearing so that it could find them. Defense counsel initially said “no” because J.J.H.

did not want to be held at Winnebago. If the court could not hold the hearing within 72 hours, it would lose competency to adjudicate the case. (Pet. App. 16a-17a).

Defense counsel also objected on due process grounds to proceeding without interpreters.

Ms. Sette: Commissioner, just before we call the first witness if I can just enter an objection for the record because I'm objecting to going forward without a certified sign language interpreter. This is a due process right my client has. She has a due process right as her liberty, and if she doesn't understand what's going on she can't communicate with us, she doesn't know what's going on, she can't refute the things that are coming up against her. (Pet. App. 19a).

The court commissioner said that the clerk had “made Herculean efforts to try to obtain an interpreter.” (Pet. App. 20a). And while it appreciated “that [J.J.H.] is not able to hear what is being said about her today or to participate in a meaningful way” it needed to establish a basis for continuing to hold her. It asked the county to call its first witness. (Pet. App. 19a). However, the county proposed an alternative procedure:

Your Honor, as an alternative I've just conferred briefly with the [Department of Health Services] representative that if the Court felt that—that [J.J.H.'s] due process rights would be violated with proceeding here today and if the court would choose to release her that there—because she is unable to return to her home there would be enough grounds to take her into custody under a Chapter 55 mental protective placement. (Pet. App. 21a).

Defense counsel was open to this possibility because J.J.H. had said she would consider various

private hospitals or a group home—just not Winnebago. (Pet. App. 21a-22a). After determining that the examiner, Dr. Pinkonsly, was off work and had other plans, the commissioner transferred the case to a circuit court judge to conduct the hearing. (Pet. App. 23a-24a).

When the judge took over, defense counsel renewed her objection that proceeding without an interpreter would violate J.J.H.’s right to due process. (Pet. App. 25a-26a). She again explained that a liberty interest was at stake. “[J.J.H.] has a right to participate. She doesn’t know—she won’t know what’s happening during testimony and she won’t be able to understand since we don’t have a sign language interpreter.” (Pet. App. 26a). Defense counsel also agreed to adjourn the proceeding provided that J.J.H. was not confined at Winnebago, the state psychiatric hospital. (Pet. App. 27a).

Due to Dr. Pinkonsly’s limited availability, the court chose to proceed with his testimony and then “try to address the problem as best we can.” (Pet. App. 28a). Dr. Pinkonsly testified that J.J.H. was mentally ill with an unspecified mood disorder and had congenital hearing loss and an intellectual disability. She was dangerous to herself or others. And she required care in a group home or locked ward. (Pet. App. 30a-34a).

Dr. Pinkonsly also testified that his opinion on dangerousness rested on a hearsay police report attached to the petition for involuntary commitment. The county called no other witnesses. Nobody testified to the allegations of the petition or the police report. (Pet. App. 33a-34a).

After the doctor’s testimony, the county first requested a §51.67 order for placement at Winnebago. It stated that the department had been unable to find an alternative to Winnebago for this 30-day placement. (Pet.

App. 42a). But then the county again offered alternatively to dismiss the case so that it could detain J.J.H. at a private hospital for an emergency protective placement.

[The County]: At this time the department has informed me that if the court chooses to dismiss this [Chapter 51 mental commitment] matter he will detain her under Chapter 55 in an emergency protective placement basis and take her to Waukesha or have her taken to Waukesha Memorial.³ (Pet. App. 43a).

Defense counsel agreed with the county's solution:

Ms. Sette: My proposal would be to go forward with the Chapter 55 mental emergency protection that the county is proposing. My client has said earlier today that she would be willing to go to Waukesha Memorial Hospital, and then would have another hearing on that petition in 72 hours. (Pet. App. 44a).

The parties' agreement would have allowed J.J.H. to stay at a private hospital for the next 72 hours while the court secured interpreters and the county looked for an appropriate protective placement facility.

The court took the matter under advisement and then questioned a public defender who had been signing to J.J.H. The defender explained that she knew sign language because her parents were deaf. She was not a certified interpreter and lacked the skills to interpret court proceedings. She was trying to facilitate

³ Waukesha Memorial Hospital is a private hospital and provides a broad range of services, including pediatrics, orthopedic, women's health and behavioral mental health. See <https://www.prohealthcare.org/locations/profile/hospital-waukesha-memorial/> (last visited 6/27/20).

communication between J.J.H. and her lawyer. She explained that J.J.H. needed two-person relay interpreters in order to communicate. (Pet. App. 47a-48a).⁴ She informed the court that J.J.H. had also been denied a certified interpreter in the related misdemeanor case. (Pet. App. 45a-46a).

The court noted that J.J.H. turned 19 that day. It wished her a happy birthday, found that she satisfied the requirements for a \$51.67 temporary guardianship and protective placement under Chapter 51, and ordered her to the one place she did not want to go—Winnebago, the state psychiatric hospital—for 30 days. (Pet. App. 50-53a).

2. J.J.H. appealed to the Wisconsin Court of Appeals. Because she had completed her 30-day commitment at Winnebago, the court ordered the parties to brief whether the appeal was moot.

3. J.J.H.'s principal issue on appeal was whether the circuit court violated her 5th and 14th Amendment rights to due process when it conducted her hearing without providing her interpreters. She could not hear the judge, the lawyers or the doctor's testimony, which was more detailed than his pro forma report and included hearsay. She could not testify herself.

The court of appeals issued a summary disposition holding that J.J.H.'s appeal was moot, the circumstances of her case were not likely to recur, and the lack of interpreters was her own fault. If she wanted them, she should have requested a 7-day adjournment of her

⁴ For some deaf people, communication about specialized topics like legal or medical matters requires two interpreters. A hearing interpreter, signs to a deaf interpreter, who can communicate more effectively with the deaf person. Michele LaVigne, *et al*, *When an Interpreter Isn't Enough: Deafness, Language and Due Process*, 2003 Wis. L. Rev. 843, 880-881 (2003).

hearing. It did not acknowledge that J.J.H. had a due process right to a hearing within 72 hours or that she agreed to postpone the hearing for an additional 72 hours. It ignored her lead argument—that she had a due process right to an interpreter for the hearing, and the circuit court violated it. The court of appeals dismissed her appeal. (Pet. App. 1a).

4. J.J.H. filed a petition for review with the Wisconsin Supreme Court one day late due to her counsel’s calendaring error. The petition again argued that her appeal was not moot and that the circuit court had denied her due process. The court initially dismissed the petition for review, but then granted habeas relief based on ineffective assistance of counsel. It reinstated the petition for review, granted the petition, and ordered briefing on the merits of J.J.H.’s appeal. (Pet. App. 7a-12a).

The National Association for the Deaf, the National Disability Rights Network, Disability Rights Wisconsin, and the Association for the Rights of Citizens with Handicaps filed an amicus brief. On February 10, 2020, the Wisconsin Supreme Court held a one-hour oral argument with only 5 justices participating.⁵ On February 27, 2020, it issued a one-sentence order dismissing the appeal as improvidently granted. Justice Rebecca Dallet dissented. (Pet. App. 7a).⁶ It noted no procedural irregularities.

⁵ Justice Brian Hagedorn did not participate. He was on the court of appeals panel that summarily dismissed J.J.H.’s appeal. Justice Ann Walsh Bradley’s reasons for not participating are not in the record.

⁶ The entire record, including the transcript, is less than 80 pages and except for redundancies is included in the Appendix.

REASONS FOR GRANTING THE WRIT

There are over one million emergency psychiatric detentions in the United States each year.⁷ The people subjected to the ensuing involuntary commitment proceedings have a host of due process rights, including the right to be present at the hearing, to testify, and to confront and cross examine witnesses. *Vitek v. Jones*, 445 U.S. 480, 495-496 (1980). When the person is deaf and lacks an interpreter for her hearing she faces a “Kafkaesque spectre of an incomprehensible ritual”⁸ which may end in confinement to a locked ward at a psychiatric hospital, mandatory behavior modification, and the administration of unwanted medication.

Federal and state courts have recognized that a deaf person must have interpreters to safeguard her due process right to understand and participate in her criminal case. It appears that no court has recognized this right for an involuntary commitment proceeding. Because these hearings are held on short notice, there is a serious risk that a deaf person will be denied the interpreters she needs to understand the government’s witnesses, confer with counsel, assist with cross-examination, testify, or even know the decision in her case.

Commitments are short. They can expire before an appeal is even filed. Indeed, they often expire before an appellate court can issue a decision on the merits. Significant errors can escape appellate review and correction. J.J.H. respectfully requests the Court to grant her petition and establish that deaf people have a due

⁷ Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, Psychiatric Services (May 22, 2020) available at <https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.202000212> (last visited 7/17/20).

⁸ *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973).

process right to understand and participate meaningfully in an involuntary commitment proceeding.

I. This Case Presents a Justiciable Controversy.

1. Article III, §2 of the United States Constitution requires a justiciable case or controversy throughout all stages of federal litigation. The party seeking relief “must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable decision.” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)(quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

2. In *Washington v. Harper*, 494 U.S. 210 (1990), a prisoner challenged the constitutionality of an involuntary medication order and continued his appeal even after treatment ceased. This Court held that his appeal was not moot. A live case or controversy remained because there was no evidence that the prisoner had recovered from his mental illness. He was still serving his sentence, so the prison could seek involuntary commitment and medication again. The constitutional violation could recur unless this Court decided the issue. *Id.* at 219.

3. For similar reasons, J.J.H.’s case is not moot. She is congenitally deaf. She has been diagnosed with a mental illness. Waukesha County or another county could petition for involuntary commitment again. The commitment hearing at issue was not the first time the circuit court had denied her an interpreter for a hearing. A few days earlier it could not find a certified interpreter for the preliminary hearing in her related disorderly conduct case. (Pet. App. 45a-46a). She could easily be denied interpreters for future commitment hearings unless the Court decides the question presented.

4. A defendant's appeal from his criminal conviction does not become moot after he finishes serving his sentence. *Sibron v. New York*, 392 U.S. 40 (1968). A live case or controversy remains because a conviction has collateral effects. It tarnishes a person's reputation and can be used to impeach his character in future legal proceedings. *Id.* at 56. A defendant is not required to prove that his conviction has collateral consequences. This Court presumes that they exist. *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (citing *Spencer*, 523 U.S. at 8; *Sibron*, 392 U.S. at 55-56)).

5. Commitments are so short that the person is often discharged before the appellate process is completed. *See Portage County v. J.W.K.*, 2019 WI 54, ¶29, 386 Wis. 2d 672, 927 N.W.2d 509. But like a criminal conviction, a commitment has collateral consequences. For example, a commitment to a mental hospital is stigmatizing and "can have a very significant impact on the individual." *Addington v. Texas*, 441 U.S. 418, 426 (1979). An adjudication of mental illness can be used in future commitment, guardianship, criminal and termination of parental rights proceedings. *See e.g.* Wis. Stat. §51.30(3)(b) and (4)(b)11.

6. In some cases, a commitment results in the loss of the right to possess a firearm, the right to vote or the right to marry. It may also have adverse housing and employment consequences. *In the Matter of Naomi B.*, 435 P.3d 918, 925 (AK 2019)(listing possible legal disabilities stemming from an adjudication of mental illness); *In re Ballay*, 482 F.2d 648, 651-652 (D.C. Cir. 1973)(same).

7. Although J.J.H.'s commitment to the Winnebago Mental Health Institute ended in 2017, a live case or controversy remains because she could be denied interpreters for possible future commitment proceedings.

Furthermore, her commitment to the state psychiatric hospital is stigmatizing, and the fact of her commitment may be used against her in future legal proceedings.

II. This Court Should Establish that a Deaf Person Undergoing an Involuntary Commitment Has a Due Process Right to Understand and Participate in Her Commitment Hearing.

- A. A person with limited English proficiency has a 6th and 14th Amendment right to understand and participate in her criminal case.

1. This Court last considered the due process rights of a criminal defendant having limited English proficiency in *Felts v. Murphy*, 201 U.S. 123 (1906) and *Perovich v. United States*, 205 U.S. 86 (1907). *Felts* involved a Civil War veteran who lost his hearing in the line of duty. A jury convicted him of murder after a two-week trial. He filed a petition for habeas corpus alleging that he was so deaf that he could only hear when someone spoke into a trumpet placed near his ear. During trial, he could not hear the testimony of the witnesses and could not suggest questions for examination or cross-examination to his lawyer. Nor was the substance of the evidence communicated to him. *Felts*, 201 U.S. at 124-127.

Felts filed a petition for writ of habeas corpus collaterally attacking his criminal conviction. The Court noted that “upon this writ the question for our determination is simply one of jurisdiction.” *Id.* at 129. It observed that *Felts* “was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the 14th Amendment to the Federal Constitution.” *Id.* at 129. *Felts*

understood he was on trial for murder, had a lawyer, and made no objection. The Court “regretted that the testimony was not read or repeated to him.” *Id.* at 130. It denied his petition for habeas corpus because it saw “no loss of jurisdiction in all of this and no absence of due process of law.” *Id.* at 130.

The Court next touched on the issue in *Perovich*, where a defendant charged with murder argued that the trial court erred in refusing to appoint an interpreter for him while he was testifying. This Court resolved the issue in one sentence: “This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of such discretion.” *Perovich*, 205 U.S. at 91.

2. Almost 70 years after *Felts* and *Perovich*, the Second Circuit Court of Appeals found a constitutional right to an interpreter in a criminal case where a jury convicted the defendant of murder after a 4-day trial. *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970). An interpreter translated the testimony of the Spanish-speaking defendant and two witnesses into English, but nobody translated the testimony of the 14 English-speaking witnesses into Spanish for the defendant. *Id.* at 388.

The Second Circuit held that Negron was denied his right to confront and cross-examine witnesses under the 6th Amendment, but he was also denied a more consequential right: “Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial.” *Id.* at 389 (citing *Lewis v. United States*, 146 U.S. 370, 372 (1892); *Illinois v. Allen*, 397 U.S. 337 (1968)). “Otherwise, ‘the adjudication loses its character

as a reasoned interaction and becomes an invective against an insensible object.” *Id.* (quoting *Note, Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458 (1969)). The court held “as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded.” *Negron*. 434 F.2d at 390.

As in *Felts*, the defendant in *Negron* had a lawyer, and there was no objection to the lack of interpretation. The Second Circuit noted that an incompetent defendant cannot “knowingly and intelligently waive his right to have the court determine his capacity to stand trial.” *Negron*, 434 F.2d at 390 (citing *Pate v. Robinson*, 383 U.S. 375, 383 (1966)). It held that “Negron’s language disability was obvious, not just a possibility, and it was as debilitating to his ability to participate in the trial as a mental disease or defect. But it was more readily ‘curable’ than any mental disorder.” *Id.* at 390-391.

3. *Negron* prompted Congress to pass the Court Interpreters Act, 28 U.S.C. §1827, which requires the appointment of an interpreter in judicial proceedings instituted by the United States. 28 U.S.C. §1827(a) and (j). See *Gaddis v. United States*, 381 F.3d 444, 457 n.13 (5th Cir. 2004)(the “original impetus” for the Court Interpreters Act was the Second Circuit’s decision in *Negron*). The Court Interpreters Act did not create new constitutional rights for defendants or expand existing rights. *United States v. Joshi*, 896 F.2d 1303, 1309 (9th Cir. 1990).

4. Today, federal and state courts recognize that a criminal defendant with limited English proficiency has either a constitutional right to an interpreter or has derivative rights—such as the right to be present and participate, to confront and cross-examine witnesses, to

defend, to testify, and to effective assistance of counsel—which are denied when he is unable to understand the court proceedings. See Thomas M. Fleming, *Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings Is Not Proficient in the Language Used*, 32 A.L.R.5th 149 §§3(a) and 4(a)(originally published 1995)(collecting cases); See also Joseph G. Cook, *Inability of the Accused to Hear or Understand the Witnesses*, 3 Constitutional Rights of the Accused 3d §23.4 (3d ed. 2019)(collecting cases); Deirdre M. Smith, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*; 46 Me. L. Rev. 87 102-113 (1994)(collecting cases).

B. This Court should establish that a deaf person has a 5th and 14th Amendment right to understand and participate in her involuntary commitment hearing.

1. *Negron* applied the 6th and 14th Amendments. The 5th and 14th Amendments also impose “constraints on government decisions that deprive individuals of ‘liberty’ or ‘property’ interests.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). “This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington*, 441 U.S. at 428 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967)). While the procedures for civil commitments may vary from state to state, they “must meet the constitutional minimum.” *Addington*, 441 U.S. at 431.

2. At a minimum, due process of law guarantees access to courts. It “signifies the right to be

heard in one's defense." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1969)(quoting *Hovey v. Elliott*, 167 U.S. 409, 417 (1897)). It requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner appropriate to the nature of the case. *Boddie*, 401 U.S. at 378 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). It guarantees the right to be present at all stages of a trial where the person's absence might frustrate the fairness of the proceedings. *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

3. This Court addressed the process due at involuntary commitment hearings in *Vitek v. Jones*, 445 U.S. 480 (1980) where a prisoner challenged the constitutionality of a statute authorizing his transfer to a mental hospital. The Court noted that "for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty.'" *Id.* at 491 (quoting *Humphrey*, 405 U.S. at 509). The person suffers a "loss of freedom from confinement," "adverse social consequences" or "stigma," and "intrusions on personal security" such as involuntary psychiatric treatment. *Id.* at 492, 494. The same is true for prisoners. *Id.* at 493. Thus, *Vitek* holds that the subject of an involuntary commitment proceeding has, at a minimum, due process rights to notice of the proceeding, to a hearing, to be present at the hearing, to be informed of the government's evidence, to present evidence, and to confront and cross-examine witnesses. *Id.*, at 495-496.

4. Some courts have recognized a due process right to an interpreter for certain kinds of civil proceedings. For example, in a trespass action involving a deaf defendant the Wisconsin Court of Appeals, citing *Negron*, said: "It is axiomatic that all litigants be able to understand the proceedings. If a person is unable to hear

and understand, that person is unable to participate, and if unable to participate, it is a denial of due process under the 5th and 14th Amendments.” *Strook v. Keding*, 2009 WI App 31, ¶17, 316 Wis. 2d 548, 766 N.W.2d 219. *See also Ramirez v. Young* 906 F.3d 530, 536 (7th Cir. 2018)(noting civil cases where courts have found a due process right to an interpreter). It appears that no court has recognized a due process right to an interpreter for an involuntary commitment proceeding, even though without one, a deaf person would be denied all the safeguards required by *Vitek*.

5. The federal Court Interpreters Act does not apply to the states, and state statutes providing for interpreters in civil cases are literally all over the map. “[B]ecause each state has its own laws, this right can differ substantially between jurisdictions. For instance, some states require courts to pay interpreters’ fees for any legal proceeding, including civil, while other states simply give courts the discretion to provide for those services.” Jena McCabe, *Can You Hear Me Now?: Interpreters for California Civil Cases*, 49 Loy. L.A. Rev. 685, 689 (Fall 2016). *See* the National Center for State Courts’ Language Access Programs by State available at: <https://www.ncsc.org/services-and-experts/areas-of-expertise/language-access/resources-for-program-managers/lap-map/map> (last visited 7/17/20). *See also* the Justice Index at the National Center for Access to Justice showing which states provide interpreters at public expense for specified case types available at: <https://justiceindex.org/2016-findings/language-access/#site-navigation> (last visited 7/17/20).

6. Because there is no uniform state court interpreters act, this Court should establish a safety net. When a statute falls short, and a deaf person’s due process right to understand and participate in her

commitment proceeding are at stake, courts should apply the longstanding due process test in *Mathews v. Eldridge*. The Court held that due process is flexible depending on the situation. The “specific dictates” of due process require a court to consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*, at 335.

7. For an involuntary commitment hearing, the “specific dictates” of the due process right to be meaningfully heard require a court to weigh the following factors. First, the private liberty interests at stake are significant. The deaf person could be labeled mentally ill, confined in a mental institution, and involuntarily medicated. Second, the risk of an erroneous deprivation of these rights is high. Without interpreters, the deaf person cannot participate in the hearing, so the court would make its decision based only on the government’s version of events. Third, the government’s burden is minimal because the Americans with Disabilities Act already obligates it to provide reasonable accommodations for deaf people for court proceedings. *See* 42 U.S.C. §§12101-12213.

III. This Case Is the Right Vehicle for Deciding the Question Presented.

1. This case does not involve a factual dispute over J.J.H.’s deafness. The county has never denied that

she is congenitally deaf and needs interpreters in order to communicate.

2. This case arises on direct review. At each level of the state court system J.J.H. argued that the circuit court violated her right to due process when it conducted her commitment hearing without providing her an interpreter. She did not invoke a statutory right to an interpreter under Wis. Stat. §885.38.

3. Although J.J.H.'s principal issue on appeal was that the circuit court violated her right to due process, the court of appeals did not even acknowledge her constitutional arguments. Instead, it attempted to decide her appeal on statutory grounds. It held that Wis. Stat. §885.38(7) gave the circuit court good cause to toll the 72-hour period for holding a probable cause hearing. (Pet. App. 5a). However, the circuit court neither found good cause nor tolled the time period. It went full steam ahead without interpreters over a due process objection.

The court of appeals also pinned the lack of interpreters on J.J.H., holding that she could have agreed to an adjournment of the hearing for up to 7 days under Wis. Stat. §51.20(7)(a). (Pet. App. 5a). It ignored the fact that the parties had offered to dismiss the case and conduct a new hearing in another 72 hours, which would have bought more time to schedule interpreters. J.J.H. presented the same arguments to the state supreme court.

4. Ordinarily, the state appellate courts' refusal to address a constitutional issue might seem like a red flag. Here, it highlights the reason the Court should take this case. State courts are not bound by Article III. Some state courts dismiss appeals from expired commitments as moot. *See e.g. Smith v. Mississippi Department of Mental Health*, 233 So.3d 308, 311 (MI 2017). Some states

will decide them if the appellant can prove an exception to the mootness doctrine or the existence of collateral consequences. *See e.g. In re Alfred H.H.*, 233 Ill.2d 345, 910 N.E.2d 74, 84 (2009); *In re Steven L.*, 2014 M.E. 1, 86 A.3d 5, 8 (2014); *In the Interest of B.A.C.*, 2017 N.D. 247, 902 N.W.2d 767 (2017). In Wisconsin, the appellant must satisfy an exception to the mootness doctrine or show that her commitment prohibits her from possessing a firearm. *Marathon County v. D.K.*, 2020 WI 8, ¶¶19-25, 390 Wis. 2d 50, 937 N.W.2d 901.

Due to the mootness doctrine, it can be difficult to obtain a state appellate court decision on the merits of an appeal from a commitment—even when a glaring due process violation has occurred at the trial court level. As this case illustrates, even a successful petition for review is no guarantee of a decision on the merits. Unless the Court establishes that a deaf person has a right to understand and participate in her involuntary commitment proceeding, this due process violation can recur undetected.

5. If this Court holds that conducting J.J.H.’s commitment proceeding without interpreters violated the 5th and 14th Amendments, then the circuit court’s order would be vacated. There can be no further proceedings because J.J.H.’s 30-day commitment has ended.

IV. The Circuit Court Violated J.J.H.’s Right to Procedural Due Process.

1. The circuit court unmistakably and unnecessarily infringed J.J.H.’s right to procedural due process. She had “massive” liberty interests at stake. The county sought to classify her as mentally ill and confine her against her will in a locked ward at the state psychiatric institution.

2. The risk of an erroneous deprivation of these rights was high. Dr. Pinkonsly, the county's sole witness testified that his opinion regarding J.J.H.'s dangerousness rested on a hearsay police report, which was not mentioned in his written examiner's report and never offered into evidence. Perhaps the report was wrong, or he summarized it inaccurately. J.J.H. could not hear his testimony, so she could not help her lawyer confront and cross-examine him. Nor could she testify herself. The lack of interpreters left the court with only Dr. Pinkonsly's summary of an officer's summary of what J.J.H.'s mom allegedly told the officer.

3. The county also had important interests at stake. It had an interest in providing care to someone who allegedly was unable to care for herself and posed a danger to others. It also had an interest in ensuring that J.J.H. was not committed erroneously. *Addington*, 441 U.S. at 426. However, the county's first two interests were largely protected. J.J.H. agreed to the department's offer to hold her at a private hospital for another 72 hours until a new hearing could be held. And Dr. Pinkonsly testified that she was accepting medication without objection. (Pet. App. 37a). Holding a hearing in another 72 hours in order to secure interpreters for J.J.H. posed no significant administrative burden on the county.

4. The record contains only the county's hearsay version of events. To this day, J.J.H.'s version of what led to her commitment is unknown. Due to the lack of interpreters, she could not understand and participate in her involuntary commitment hearing. For all practical purposes she was absent from it. The circuit court violated her right to procedural due process.

CONCLUSION

For the forgoing reasons, the Court should grant this petition for writ of certiorari.

Dated this 21st day of July, 2020.

Colleen D. Ball
Assistant State Public Defender
Counsel of Record

WISCONSIN STATE
PUBLIC DEFENDER
735 N. Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov