SUPREME COURT OF WISCONSIN

CASE NO.:	2018AP1887
COMPLETE TITLE:	In the matter of the mental commitment of K.E.K.: Waupaca County, Petitioner-Respondent, v. K.E.K., Respondent-Appellant-Petitioner.

REVIEW OF DECISION OF THE COURT OF APPEALS
Reported at 389 Wis. 2d 104,936 N.W.2d 405
(2019 – unpublished)

OPINION FILED:	February 9, 2021
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	November 17, 2020
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Waupaca
JUDGE:	Vicki L. Clussman

JUSTICES:
ZIEGLER, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., ANN WALSH BRADLEY, REBECCA GRASSL BRADLEY, and HAGEDORN, JJ., joined. DALLET, J., filed a dissenting opinion, in which KAROFSKY, J., joined
NOT PARTICIPATING:

ATTORNEYS:
For the respondent-appellant-petitioner, there were briefs filed by *Colleen D. Ball*, assistant state public defender. There was an oral argument by *Colleen D. Ball*.

For the petitioner-respondent, there was a brief filed by *David G. Been*, Waupaca corporation counsel. There was an oral argument by *David G. Been*.

APPENDIX A

2021 WI 9

No. 2018AP1887
(L.C. No. 2017ME44)

STATE OF WISCONSIN : IN SUPREME COURT

In the matter of the mental commitment of K.E.K.:

Waupaca County,

Petitioner-Respondent,

v.

K.E.K.,

Respondent-Appellant-Petitioner.

FILED

FEB 9, 2021

Sheila T. Reiff
Clerk of Supreme Court

ZIEGLER, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., ANN WALSH BRADLEY, REBECCA GRASSL BRADLEY, and HAGEDORN, JJ., joined. DALLET, J., filed a dissenting opinion, in which KAROFSKY, J., joined.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 ANNETTE KINGSLAND ZIEGLER, J. This is a review of an unpublished decision of the court of appeals, Waupaca Cnty. v. K.E.K., No. 2018AP1887, unpublished slip op. (Wis. Ct. App. Sept. 26, 2020), affirming the Waupaca County circuit court's[1]

[1] The Honorable Vicki L. Clussman presided.

order extending K.E.K.'s involuntary commitment[2] pursuant to Wis. Stat. § 51.20(13)(g)3. (2017-18).[3]

¶2 K.E.K. challenges the commitment extension arguing that Wis. Stat. § 51.20(1)(am), the statute upon which the County relied to prove K.E.K.'s dangerousness, is both facially unconstitutional and unconstitutional as applied to this case because the statute does not require a sufficient showing of current dangerousness as exhibited by recent acts of dangerousness.[4] Specifically, she claims that the standard under

[2] Wisconsin Stat. § 51.20, as well as the case law, uses "recommitment" and "extension of a commitment" interchangeably, and we do as well. See Portage Cnty. v. J.W.K., 2019 WI 54, ¶1 n.1, 386 Wis. 2d 672, 927 N.W.2d 509; see also Wis. Stat. §§ 51.20(13)(g)2r., 3.

[3] All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise indicated.

[4] We note that K.E.K.'s petition for review also included a question involving the circuit court's competency to exercise subject matter jurisdiction over K.E.K.'s extension proceeding. However, K.E.K. did not develop, nor discuss in any way, this argument in her briefs. Accordingly, we will not consider it. See Serv. Emp. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35 ("We do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case.").

§ 51.20(1)(am) violates due process[5] and equal protection of the laws[6] and is thus unconstitutional on its face and as applied.[7]

¶3 However, similar to an initial commitment, a recommitment requires a showing of mental illness and current dangerousness. A recommitment petition must "establish the same elements with the same quantum of proof" as an initial commitment. Waukesha Cnty. v. J.W.J., 2017 WI 57, ¶20, 375

[5] K.E.K. specifically alleges that Wis. Stat. § 51.20(1)(am) violates substantive due process. Substantive due process derives from the Fifth and Fourteenth Amendments to the United States Constitution. See U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). "Substantive due process provides protection from 'certain arbitrary, wrongful government actions.'" State ex rel. Greer v. Wiedenhoeft, 2014 WI 19, ¶57, 353 Wis. 2d 307, 845 N.W.2d 373 (quoting State v. Schulpius, 2006 WI 1, ¶33, 287 Wis. 2d 44, 707 N.W.2d 495).

[6] The right to equal protection of the laws arises from the Fourteenth Amendment to the United States Constitution. See U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[7] K.E.K. also asserts that Wis. Stat. § 51.20(1)(am) violates the Privileges or Immunities Clause of the Fourteenth Amendment. The Privileges or Immunities Clause provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. K.E.K. asserts that "when [her] brief invokes substantive due process, she is also invoking the Privileges or Immunities Clause." Beyond this cursory statement, she does not develop her argument based on the text and history of the Privileges or Immunities Clause. Accordingly, we will not develop this argument and decline to entertain K.E.K.'s Privileges or Immunities Clause claims. See Vos, 393 Wis. 2d 38, ¶24.

Wis. 2d 542, 895 N.W.2d 783. The initial commitment requires proof that the individual is mentally ill, a proper subject for treatment, and currently dangerous. See Wis. Stat. § 51.20(1); Portage Cnty. v. J.W.K., 2019 WI 54, ¶16, 386 Wis. 2d 672, 927 N.W.2d 509. Section 51.20(1)(am) provides an alternative path to prove current dangerousness provided the evidence demonstrates "a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." § 51.20(1)(am).

¶4 Accordingly, we conclude that K.E.K. is unable to prove that Wis. Stat. § 51.20(1)(am) cannot be enforced under any circumstances because due process and the statute both require a showing of mental illness and current dangerousness. As such, K.E.K.'s facial due process challenge fails.

¶5 Moreover, Wis. Stat. § 51.20(1)(am) creates an alternative path to give counties a more realistic basis by which to prove current dangerousness when it is likely the committed individual would discontinue treatment if no longer committed. Thus, the state has a rational basis for treating those recommitted under § 51.20(1)(am) and those committed under § 51.20(1)(a)2.e. differently.

¶6 Finally, K.E.K.'s as-applied constitutional challenges are disguised sufficiency of the evidence challenges. Her argument is that she does not meet the statutory standard for dangerousness, not that Wis. Stat. § 51.20(1)(am) is unconstitutional when applied to K.E.K.'s specific facts.

¶7 Therefore, we conclude that Wis. Stat. § 51.20(1)(am) is facially constitutional and that K.E.K.'s as-applied constitutional challenges fail. Accordingly, we affirm the decision of the court of appeals.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

¶8 On November 22, 2017, Waupaca County (the County) filed an initial petition seeking to commit K.E.K. under Wis. Stat. § 51.20(1)(a)2.e., the "fifth standard."[8] On December 8,

[8] The "fifth standard" provides that "an individual, other than an individual who is alleged to be drug dependent or developmentally disabled," is considered "dangerous" if:

> after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. The probability of suffering severe mental, emotional or physical harm is not substantial under this subd.2.e. if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable

2017, the circuit court held a jury trial on the County's petition for initial commitment. The jury entered the verdict that K.E.K. was mentally ill, a danger to herself and others, and a proper subject for treatment. On the basis of this jury verdict, the circuit court entered an Order of Commitment, committing K.E.K. for six months.

¶9 On May 22, 2018, the County filed a petition seeking to extend K.E.K.'s commitment. The petition alleged: (1) K.E.K. was "currently under an order of commitment"; (2) K.E.K. was "mentally ill, developmentally disabled or drug dependent, and a proper subject for treatment"; (3) K.E.K. was "dangerous because there [was] a substantial likelihood, based on [K.E.K.'s] treatment record, that [K.E.K.] would be a proper subject for commitment if treatment were withdrawn"; and (4) that "a recommitment of [K.E.K. was] recommended . . . for the protection of society, [K.E.K.], or both." Attached to the petition was an evaluation conducted by K.E.K.'s case manager.

> probability that the individual will avail himself or herself of these services or if the individual is appropriate for protective placement under ch. 55. Food, shelter or other care that is provided to an individual who is substantially incapable of obtaining food, shelter or other care for himself or herself by any person other than a treatment facility does not constitute reasonable provision for the individual's care or treatment in the community under this subd.2.e. The individual's status as a minor does not automatically establish a substantial probability of suffering severe mental, emotional, or physical harm under this subd.2.e.

Wis. Stat. § 51.20(1)(a)2.e.

In this evaluation, K.E.K.'s case manager states, in part, "[A]t this time, this worker believes that without a commitment, [K.E.K.] would leave the facility she is living at, stop taking her medications, and repeat all behaviors that were the cause of the filing for the commitment in 2017."

¶10 The circuit court held a hearing on the extension petition on June 6, 2018.[9] At the hearing, the court heard from the County's psychiatrist, who testified that K.E.K. "suffers from schizophrenia, paranoid type." He further opined about K.E.K.'s actions if K.E.K. were no longer committed:

> Well, I've explained I do believe she's improved with her current treatment interventions care and safe keeping at this group home, Evergreen and with medications. But she has distinctive lack of insight into her mental illness and that impedes her treatment in general.
>
> And so if she is off commitment or if treatment is withdrawn, she will, in my opinion, almost certainly stop her medications, she will almost certainly leave Evergreen. She mentioned to me that she would live with family in Illinois, but her mother cited advancing age, and just being uncomfortable with the stress of this, due to her mother's age. So I don't think she has any kind of set housing set-up. And I'm concerned that off mediations, which I believe she would stop them, and without stable housing, she would decompensate and become a proper subject for commitment, in my opinion, again.

The court also heard from K.E.K.'s case manager. She testified that she believed "an extension is warranted because without the treatment and care that [K.E.K.'s] receiving

[9] The day before the extension hearing, K.E.K. waived her right to a jury trial, instead opting for a bench trial.

currently, . . . [K.E.K.] will no longer take her medications, become more unstable, and potentially [sic] a danger to herself as a result of that." The court also heard from the manager of K.E.K.'s group home and K.E.K. herself.

¶11 At the conclusion of the testimony, the circuit court found that K.E.K. would be a proper subject for recommitment. The court specifically found that "the county has met its burdens in showing that if treatment were withdrawn, that [K.E.K.] would be a proper subject for a commitment." Relying on the recommitment standard from Wis. Stat. § 51.20(1)(am), the court found that K.E.K. was currently dangerous and ordered her commitment be extended for 12 months.

¶12 K.E.K. appealed the circuit court's commitment extension order, challenging the constitutionality of Wis. Stat. § 51.20(1)(am). On September 26, 2019, the court of appeals affirmed, holding, in relevant part, that § 51.20(1)(am) does not violate due process facially nor as applied to K.E.K. K.E.K., No. 2018AP1887, ¶¶33-40, 46-50.

¶13 On October 30, 2019, K.E.K. petitioned this court for review. We held the petition in abeyance pending resolution of Winnebago County v. C.S., 2020 WI 33, 391 Wis. 2d 35, 940 N.W.2d 875. After this court's decision in C.S., K.E.K. filed a motion to amend her petition for review. Her new petition alleged that Wis. Stat. § 51.20(1)(am) violated due process, the

Fourteenth Amendment's Privileges or Immunities Clause,[10] and the Equal Protection Clause. We granted K.E.K.'s motion to amend her petition and granted review.

II. STANDARD OF REVIEW

¶14 K.E.K. brings facial and as-applied constitutional challenges to Wis. Stat. § 51.20(1)(am). A facial challenge claims the law is "unconstitutional on its face." League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302 (quoting State v. Wood, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63). "Under a facial challenge, the challenger must show that the law cannot be enforced under any circumstances." C.S., 391 Wis. 2d 35, ¶14 (quoting Winnebago Cnty. v. Christopher S., 2016 WI 1, ¶34, 366 Wis. 2d 1, 878 N.W.2d 109). A statute under review is presumed constitutional when challenged facially.[11] Id.

[10] As we stated above, K.E.K. did not develop this argument, and we do not address her Privileges or Immunities Clause claim. See supra, ¶2 n.7.

[11] The parties dispute what burden of proof must be shown to prove a statute is unconstitutional. Relying on this court's precedent, the County argues that K.E.K. must prove the statute is unconstitutional beyond a reasonable doubt. See Winnebago Cnty. v. C.S., 2020 WI 33, ¶14, 391 Wis. 2d 35, 940 N.W.2d 875; Mayo v. Wis. Injured Patients & Families Comp. Fund, 2018 WI 78, ¶27, 383 Wis. 2d 1, 914 N.W.2d 67. Relying on federal precedent, K.E.K. counters and argues that she must only make a "plain showing" or "clearly demonstrate" that the law violates the federal Constitution. See United States v. Morrison, 529 U.S. 598, 607 (2000); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012). We need not resolve this dispute in this case because the law is constitutional under either standard.

¶15 "In contrast, in an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us 'not hypothetical facts in other situations.'" League of Women Voters, 357 Wis. 2d 360, ¶13 (quoting Wood, 323 Wis. 2d 321, ¶13). "[W]hile we presume the statute is constitutional, 'we do not presume that the State applies statutes in a constitutional manner.'" Mayo v. Wis. Injured Patients & Families Comp. Fund, 2018 WI 78, ¶56, 383 Wis. 2d 1, 914 N.W.2d 678 (quoting Tammy W-G. v. Jacob T., 2011 WI 30, ¶48, 333 Wis. 2d 273, 797 N.W.2d 854).

¶16 Under either type of challenge, "the constitutionality of a statute is a question of law we review de novo." C.S., 391 Wis. 2d 35, ¶13.

¶17 K.E.K.'s argument requires us to interpret Wis. Stat. § 51.20(1)(am). "[S]tatutory interpretation is a question of law we review de novo." J.W.K., 386 Wis. 2d 672, ¶10. However, we have already interpreted § 51.20(1)(am). See id., ¶¶19, 23-24. "[W]here a statute has been authoritatively interpreted by this court, the party challenging that interpretation must establish that our prior interpretation was 'objectively wrong.'" State v. Breitzman, 2017 WI 100, ¶5 n.4, 378 Wis. 2d 431, 904 N.W.2d 93; see also Johnson Controls, Inc. v. Emp'rs Ins. of Wausau, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257; Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶45, 281 Wis. 2d 300, 697 N.W.2d 417.

III. ANALYSIS

¶18 K.E.K. is challenging her recommitment on the basis that Wis. Stat. § 51.20(1)(am) is unconstitutional facially and as applied. Section 51.20 "governs involuntary civil commitments for mental health treatment." State v. Dennis H., 2002 WI 104, ¶14, 255 Wis. 2d 359, 647 N.W.2d 851. The statute "contains five different definitions or standards of dangerousness for purposes" of an initial commitment. Id.; see also § 51.20(1)(a)2.a.-e. After an initial commitment, a county can seek an extension of a commitment for "a period not to exceed one year." § 51.20(13)(g)1., 3. At a recommitment proceeding, a county may prove current dangerousness under either the five standards of dangerousness under § 51.20(1)(a)2.a.-e. or under those five standards in combination with § 51.20(1)(am). J.W.K., 386 Wis. 2d 672, ¶18; Langlade Cnty. v. D.J.W., 2020 WI 41, ¶50, 391 Wis. 2d 231, 942 N.W.2d 277. Pursuant to § 51.20(1)(am), a county has an alternative avenue for proving dangerousness at an extension proceeding:

> If the individual has been the subject of inpatient treatment for mental illness . . . immediately prior to commencement of the proceedings as a result of . . . a commitment or protective placement ordered by a court under this section . . . the requirements of a recent overt act, attempt or threat to act under par. (a)2.a. or b., pattern of recent acts or omissions under par. (a)2.c. or e., or recent behavior under par. (a)2. d. may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

Wis. Stat. § 51.20(1)(am).

¶19 We later explained that this section works in combination with the five standards of dangerousness, specifically focusing on the standard set forth in Wis. Stat. § 51.20(1)(a)2.d.:

> [W]e focus on whether the introduced testimony meets the standard for dangerousness set by Wis. Stat. § 51.20(1)(a)2.d., as viewed through the lens of § 51.20(1)(am). That is, the testimony must provide sufficient evidence to support the conclusion that D.J.W. would be "unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue[,]" § 51.20(1)(a)2.d., if treatment were withdrawn. § 51.20(1)(am).

D.J.W., 391 Wis. 2d 231, ¶50. Accordingly, Wis. Stat. § 51.20(1)(am) works in combination with the five standards to provide counties with an alternative avenue for proving dangerousness.

¶20 K.E.K. argues that her recommitment is unconstitutional because Wis. Stat. § 51.20(1)(am): (A) violates her right to due process by allowing her to be committed without a showing of current dangerousness; (B) violates her right to equal protection of the law by allowing commitment under circumstances different than those existing under the fifth standard of dangerousness;[12] and (C) is

[12] This court discussed the requirements for the fifth standard in Dennis H., stating:

unconstitutional as applied to the specific facts of her case. We disagree and uphold the statute against her due process, equal protection, and as-applied challenges.

A. Due Process

¶21 K.E.K. argues that Wis. Stat. § 51.20(1)(am) violates her constitutional right to due process. K.E.K. asserts that § 51.20(1)(am) does not require a showing of current dangerousness because it does not require the government to prove recent acts or omissions. However, this position misconstrues what § 51.20(1)(am) and due process require. Section 51.20(1)(am) is facially constitutional because it requires a showing of mental illness and current dangerousness, as due process demands. Accordingly, K.E.K. cannot show that § 51.20(1)(am) "cannot be enforced under any circumstances."

> The fifth standard permits commitment only when a mentally ill person needs care or treatment to prevent deterioration but is unable to make an informed choice to accept it. This must be "demonstrated by both the individual's treatment history" and by the person's "recent acts or omissions." Wis. Stat. § 51.20(1)(a)2.e. [(1999-2000).] It must also be substantially probable that if left untreated, the person "will suffer severe mental, emotional or physical harm" resulting in the loss of the "ability to function independently in the community" or in the loss of "cognitive or volitional control." Id. Only then may the individual be found "dangerous" under the fifth standard.

State v. Dennis H., 2002 WI 104, ¶39, 255 Wis. 2d 359, 647 N.W.2d 851.

1. Wisconsin Stat. § 51.20(1)(am) requirements

¶22 Statutory interpretation "begins with the language of the statute." State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotations omitted). If its meaning is plain, then our inquiry ends. Id. We give statutory language "its common, ordinary, and accepted meaning." Id. We give "technical or specially-defined words or phrases" their "technical or special definitional meaning." Id. "Context is important to meaning." Id., ¶46. Accordingly, we interpret statutory language "not in isolation but as part of a whole." Id. For the whole statute to have meaning, we must "give reasonable effect to every word" and "avoid surplusage." Id.

¶23 However, when we have already authoritatively interpreted a statute, we are bound to follow that interpretation unless there is a special justification to depart from our earlier interpretation. See Johnson Controls, 264 Wis. 2d 60, ¶94; Progressive N. Ins. Co., 281 Wis. 2d 300, ¶45. Because we already interpreted Wis. Stat. § 51.20(1)(am) in J.W.K., we must follow our previous interpretation of § 51.20(1)(am).

¶24 As we stated in J.W.K., at a recommitment proceeding, "the County may, as an alternative to the options outlined in § 51.20(1)(a)2.a.-e., prove dangerousness by showing 'a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.'" J.W.K., 386

Wis. 2d 672, ¶19. "[P]aragraph (am) functions as an alternative evidentiary path, reflecting a change in circumstances occasioned by an individual's commitment and treatment." Id.

¶25 However, each recommitment, including those where the County utilizes Wis. Stat. § 51.20(1)(am), "requires the County to prove the same elements with the same quantum of proof required for the initial commitment." Id., ¶24. An initial commitment requires a county to prove that the individual is mentally ill, a proper subject for commitment, and currently dangerous. See § 51.20(1); J.W.K., 386 Wis. 2d 672, ¶16. We explained that:

> The dangerousness standard is not more or less onerous during an extension proceeding; the constitutional mandate that the County prove an individual is both mentally ill and dangerous by clear and convincing evidence remains unaltered. Each extension hearing requires proof of current dangerousness. It is not enough that the individual was at one point a proper subject for commitment. The County must prove the individual "is dangerous." The alternate avenue of showing dangerousness under paragraph (am) does not change the elements or quantum of proof required. It merely acknowledges that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness outlined in § 51.20(1)(a)2.a.-e.

J.W.K., 386 Wis. 2d 672, ¶24 (citations omitted).

¶26 Accordingly, as we authoritatively determined in J.W.K., Wis. Stat. § 51.20(1)(am) merely provides an alternative path for the County to prove current dangerousness——it does not change the requirement that the County prove, by clear and convincing evidence, that the individual is mentally ill, a

proper subject for treatment, and currently dangerous. Id. We reaffirm that determination.

2. Due process and commitment proceedings

¶27 The Constitution forbids the government from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. V (applying the prohibition to the federal government); amend. XIV, § 1 (applying the same to the States). "[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." J.W.K., 386 Wis. 2d 672, ¶16. As we stated last term, "in a civil commitment case, due process requires the [government] to prove by clear and convincing evidence that the individual is both mentally ill and dangerous." Marathon Cnty. v. D.K., 2020 WI 8, ¶29, 390 Wis. 2d 50, 937 N.W.2d 901.

¶28 The United States Supreme Court established that, before the government can commit someone and deprive that person of liberty, "the [government] must prove by clear and convincing evidence that [the individual] is demonstrably dangerous to the community." Foucha v. Louisiana, 504 U.S. 71, 81 (1992). K.E.K. asserts that this means the County must use recent acts or omissions to prove she is "demonstrably dangerous." However, no such requirement appears in Foucha, nor has the Court ever required a specific type of evidence to prove current dangerousness. Indeed, "[i]n this complicated and difficult area, the Supreme Court 'has wisely left the job of creating statutory definitions to the legislators who draft state laws.'"

Dennis H., 255 Wis. 2d 359, ¶38 (quoting State v. Post, 197 Wis. 2d 279, 304, 541 N.W.2d 115 (1995)). As such, we decline to create, from whole-cloth, a constitutional requirement that a county use recent acts or omissions at a commitment extension proceeding. Instead, we rely on the options the legislature provided to the counties to prove current dangerousness——the five standards from Wis. Stat. § 51.20(1)(a)2.a.-e. and the alternative evidentiary path from § 51.20(1)(am). It is the definitions and requirements the legislature chose that must comport with due process, not the novel requirement that K.E.K. proposes.

3. Wisconsin Stat. § 51.20(1)(am) satisfies due process.

¶29 To satisfy due process, the government must prove that the individual is both mentally ill and currently dangerous by clear and convincing evidence. See Foucha, 504 U.S. at 81. We have held that, at a recommitment proceeding, a county must meet this due process standard. J.W.K., 386 Wis. 2d 672, ¶24. Thus, to succeed on a due process claim here, K.E.K. must prove that Wis. Stat. § 51.20(1)(am) does not require a showing of current dangerousness. K.E.K. cannot do so because, as this court unanimously recognized, § 51.20(1)(am) creates an alternative

evidentiary path to prove current dangerousness. See J.W.K., 386 Wis. 2d 672, ¶¶24, 34.[13]

¶30 Therefore, because Wis. Stat. § 51.20(1)(am) requires proof of current dangerousness, it satisfies the Due Process Clause's requirements. Accordingly, K.E.K. cannot show that § 51.20(1)(am) violates Due Process in all applications, so her facial challenge fails.

B. Equal Protection

¶31 K.E.K. also alleges that Wis. Stat. § 51.20(1)(am) violates her constitutional right to equal protection of the laws by allowing for commitment under different standards than a commitment under the fifth standard, § 51.20(1)(a)2.e. However, the state[14] has a rational basis for allowing these different evidentiary standards. Accordingly, K.E.K.'s facial equal protection claim fails.

¶32 K.E.K. claims that those recommitted under Wis. Stat. § 51.20(1)(am) and those committed under the fifth standard are similarly situated, but that a county may commit someone under

[13] The majority opinion in J.W.K. stated that "[e]ach extension hearing requires proof of current dangerousness . . . . The County must prove the individual 'is dangerous.' The alternate avenue of showing dangerousness under paragraph (am) does not change the elements or quantum of proof required." J.W.K., 386 Wis. 2d 672, ¶24 (citations omitted). Similarly, the dissent described Wis. Stat. § 51.20(1)(am) as "creating an alternative path to prove current dangerousness . . . ." Id., ¶35 (Dallet, J., dissenting).

[14] Although it is the counties who file petitions under Wis. Stat. § 51.20, the state created the commitment scheme via statute. Accordingly, the state must possess a rational basis for any differential treatment, not the counties.

§ 51.20(1)(am) without proving the elements that we held are necessary for a commitment under the fifth standard.[15] K.E.K. argues that the state does not have a rational basis for requiring these elements for an initial commitment under the fifth standard and a recommitment under § 51.20(1)(am). Thus, she asserts, § 51.20(1)(am) violates her right to equal protection of the laws.

¶33 "To prove an equal protection clause violation, the party challenging a statute's constitutionality must show that 'the state unconstitutionally treats members of similarly situated classes differently.'" State v. West, 2011 WI 83, ¶90, 336 Wis. 2d 578, 800 N.W.2d 929 (quoting Post, 197 Wis. 2d at 318). However, "[t]he right to equal protection does not require that such similarly situated classes be treated identically, but rather requires that the distinction made in treatment have some relevance to the purpose for which

[15] We described these necessary elements for a commitment under the fifth standard in Dennis H.:

> The fifth standard permits commitment only when a mentally ill person needs care or treatment to prevent deterioration but is unable to make an informed choice to accept it. This must be "demonstrated by both the individual's treatment history" and by the person's "recent acts or omissions." It must also be substantially probable that if left untreated, the person "will suffer severe mental, emotional or physical harm" resulting in the loss of the "ability to function independently in the community" or in the loss of "cognitive or volitional control."

Dennis H., 255 Wis. 2d 359, ¶39 (citation omitted).

classification of the classes is made." Id. Thus, the first step in an equal protection claim is to identify similarly situated, yet differently treated individuals. See Dennis H., 255 Wis. 2d 359, ¶31; Post, 197 Wis. 2d at 318-19. The second step is to determine if the government has an appropriate basis for the different classifications and treatment. See Dennis H., 255 Wis. 2d 359, ¶31.

¶34 Those committed under Wis. Stat. § 51.20(1)(am) and those committed under the fifth standard are similarly situated. A county, under either § 51.20(1)(am) or the fifth standard, must prove exactly the same underlying elements with the same quantum of proof required for commitment. See J.W.K., 386 Wis. 2d 672, ¶24 ("The alternate avenue of showing dangerousness under paragraph (am) does not change the elements or quantum of proof required. It merely acknowledges that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness outlined in § 51.20(1)(a)2.a.-e."). Moreover, when a county uses § 51.20(1)(am), it does so in combination with the five standards, including when a county commits someone under the fifth standard through the lens of § 51.20(1)(am). See D.J.W., 391 Wis. 2d 231, ¶50. That is, the two statutes work in concert with each other, so those committed under either section face nearly identical elements and restraints. Accordingly, a person facing a commitment under the fifth standard and a person facing an extension of a commitment under § 51.20(1)(am) are similarly situated. Cf. Post, 197 Wis. 2d at 318-19 (holding that

"persons committed under chapters 51 and 980 are similarly situated for purposes of an equal protection comparison").

¶35 Because those committed under Wis. Stat. § 51.20(1)(am) and those committed under the fifth standard are similarly situated, we must evaluate whether the "statutorily distinctive mechanisms for dealing with the two classes was proper in light of the difference between the classifications." West, 336 Wis. 2d 578, ¶92. "Whether a legislative distinction between otherwise similarly situated persons violates equal protection depends upon whether there is a reasonable basis to support it." Dennis H., 255 Wis. 2d 359, ¶31. "Where the classification does not involve a suspect class, equal protection is denied only if the legislature has made an irrational or arbitrary classification." Id. (quoting State ex rel. Jones v. Gerhardstein, 141 Wis. 2d 710, 733, 416 N.W.2d 883 (1987)). Describing the power of the state to create different classifications, we have stated:

> "[T]he state retains broad discretion to create classifications so long as the classifications have a reasonable basis." Under the rational basis test, a statutory classification is presumed to be proper. It will be sustained if the reviewing court can identify any reasonable basis to support it. Any doubt must be resolved in favor of the reasonableness of the classification and the constitutionality of the statute in which it is made. A "legislative enactment must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest."

Dennis H., 255 Wis. 2d 359, ¶32 (citations omitted). Accordingly, we apply a rational basis level of scrutiny to Wis.

Stat. § 51.20(1)(am) and will sustain it if we can identify "any reasonable basis to support" the different classifications.

¶36 We determine that the state has a reasonable basis for treating those committed under the fifth standard and those committed under Wis. Stat. § 51.20(1)(am) differently. The purpose of § 51.20(1)(am) "is to allow extension of a commitment when the patient's condition has not improved enough to warrant discharge. Because of the therapy received, evidence of recent action exhibiting 'dangerousness' is often nonexistent. Therefore, the emphasis is on the attendant consequence to the patient should treatment be discontinued." M.J. v. Milwaukee Cnty. Combined Cmty. Servs. Bd., 122 Wis. 2d 525, 530-31, 362 N.W.2d 190 (Ct. App. 1984); see also J.W.K., 386 Wis. 2d 672, ¶23. Thus, unlike the fifth standard, § 51.20(1)(am) applies only to patients that are already receiving treatment. By enacting this alternative means of showing dangerousness, the legislature conceivably could have wanted——and likely did want—— to give counties a more realistic basis by which to prove current dangerousness when it is likely the committed individual would discontinue treatment if no longer committed. See J.W.K., 386 Wis. 2d 672, ¶24 ("[Wisconsin Stat. § 51.20(1)(am)] merely acknowledges that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness outlined in § 51.20(1)(a)2.a.-e."). As the court of appeals previously explained:

> The clear intent of the legislature in amending [Wis. Stat. § 51.20(1)(am)] was to avoid the "revolving door" phenomena whereby there must be proof of a recent overt act to extend the commitment but because the patient was still under treatment, no overt acts occurred and the patient was released from treatment only to commit a dangerous act and be recommitted. The result was a vicious circle of treatment, release, overt act, recommitment. The legislature recognized the danger to the patients and others of not only allowing for, but requiring, overt acts as a prerequisite for further treatment.

State v. W.R.B., 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987). Accordingly, we hold that addressing the "revolving door" phenomena is a reasonable basis for the different evidentiary avenues of § 51.20(1)(am) and the fifth standard.

¶37 Accordingly, K.E.K. is unable to prove that the state impermissibly treats those committed under Wis. Stat. § 51.20(1)(am) and those committed under the fifth standard differently. Therefore, the statute does not violate K.E.K.'s right to equal protection of the laws.

C. As Applied

¶38 K.E.K. also challenges Wis. Stat. § 51.20(1)(am)'s constitutionality as applied to her. She claims that, based on the specifics of her case, § 51.20(1)(am) violates due process, the Privileges or Immunities Clause, and the Equal Protection Clause. She argues that, because she was not dangerous to herself or others, "§ 51.20(1)(am) plainly, clearly, and beyond a reasonable doubt violates the 14th Amendment as applied to the facts of [her] case." This argument, however, advances an evidentiary sufficiency challenge under the guise of as-applied constitutional challenges. Accordingly, K.E.K.'s as-applied

constitutional challenges to § 51.20(1)(am) fail because they are sufficiency of the evidence challenges, not constitutional challenges.

¶39 A claim that a statute is unconstitutional as applied is "a claim that a statute is unconstitutional on the facts of a particular case or to a particular party." Voters with Facts v. City of Eau Claire, 2018 WI 63, ¶60, 382 Wis. 2d 1, 913 N.W.2d 131 (quoting Olson v. Town of Cottage Grove, 2008 WI 51, ¶44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211). Although these claims operate on the basis of the "facts of a particular case," it does not transform the as-applied constitutional challenge into an alternative means to attack the sufficiency of the evidence.

¶40 K.E.K. asserts that "[i]t is undisputed that [she] posed no danger to herself or others during her commitment." This is not a challenge to the constitutionality of the statute as applied to K.E.K.'s facts; it challenges the application of the statute to the facts of this case. The statute has no application, constitutional or otherwise, against those who are not currently dangerous. See, e.g., D.J.W., 391 Wis. 2d 231, ¶59 (concluding the evidence was insufficient at a recommitment hearing to prove dangerousness under Wis. Stat. § 51.20(1)(am)). If K.E.K. is not currently dangerous, the County has no power to commit her under the statute. If the evidence is insufficient, it does not mean the statute is unconstitutional——it merely means that the County violated the statute.

¶41 Accordingly, K.E.K.'s as-applied constitutional challenges fail. Her dispute is with the sufficiency of the evidence, not with the constitutionality of Wis. Stat. § 51.20(1)(am).

IV. CONCLUSION

¶42 We conclude that K.E.K. is unable to prove that Wis. Stat. § 51.20(1)(am) cannot be enforced under any circumstances because due process and the statute both require a showing of mental illness and current dangerousness. As such, K.E.K.'s facial due process challenge fails.

¶43 Moreover, Wis. Stat. § 51.20(1)(am) creates an alternative path to give counties a more realistic basis by which to prove current dangerousness when it is likely the committed individual would discontinue treatment if no longer committed. Thus, the state has a rational basis for treating those recommitted under § 51.20(1)(am) and those committed under § 51.20(1)(a)2.e. differently.

¶44 Finally, K.E.K.'s as-applied constitutional challenges are disguised sufficiency of the evidence challenges. Her argument is that she does not meet the statutory standard for dangerousness, not that Wis. Stat. § 51.20(1)(am) is unconstitutional when applied to K.E.K.'s specific facts.

¶45 Therefore, we conclude that Wis. Stat. § 51.20(1)(am) is facially constitutional and that K.E.K.'s as-applied constitutional challenges fail. Accordingly, we affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

¶46 REBECCA FRANK DALLET, J. (*dissenting*). The Fourteenth Amendment to the United States Constitution prohibits the government from involuntarily confining a person with a mental illness unless it can prove that person is currently dangerous. K.E.K. argues that Wis. Stat. § 51.20(1)(am) (2017-18)[1] is unconstitutional because it allows the government to extend her commitment based not on her recent acts or omissions but on a treatment record detailing past behaviors and on predictions that, if no longer committed, she might behave dangerously in the future. In the face of that constitutional challenge, the majority fails to engage in any real analysis of whether this type of "alternative" evidence passes constitutional muster. It does not. Section 51.20(1)(am) is facially unconstitutional because it eliminates the constitutionally required showing of current dangerousness in favor of "alternative" evidence that shows only that a person was or might become dangerous. Therefore, I respectfully dissent.

[1] K.E.K.'s challenge implicates only the first of the three sentences in Wis. Stat. § 51.20(1)(am). If successful, her challenge would void only that sentence because the other two are distinct, separable, and not dependent on the first. See State v. Hezzie R., 219 Wis. 2d 848, 863, 580 N.W.2d 660 (1998) ("[P]art of a statute may be unconstitutional, and the remainder may still have effect, provided the two parts are distinct and separable and are not dependent upon each other." (quoting Muench v. PSC, 261 Wis. 492, 515, 55 N.W.2d 40 (1952))). Therefore, when I refer to § 51.20(1)(am), I refer only to its first sentence.

I

¶47 The civil commitment of persons diagnosed with a mental illness constitutes a government exercise of either its parens patriae power to care for citizens unable to care for themselves or its police power to prevent harm to the community. See Addington v. Texas, 441 U.S. 418, 426 (1979). While both are legitimate government interests, neither is boundless. Involuntary mental health commitments are, after all, "a significant deprivation of liberty." Id.; Vitek v. Jones, 445 U.S. 480, 491–92 (1980). They deprive persons of their most basic and fundamental freedom "to go unimpeded about [their] affairs" and to make decisions regarding their health. Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), vacated and remanded on other grounds, 421 U.S. 957 (1975), reinstated, 413 F. Supp. 1318 (E.D. Wis. 1976).

¶48 The Fourteenth Amendment to the United States Constitution guarantees that no citizen may be involuntarily committed without due process. See Vitek, 445 U.S. at 491–92 ("[C]ommitment . . . produces 'a massive curtailment of liberty,' and in consequence 'requires due process protection.'" (quoted sources omitted)). Thus, an individual facing commitment must have a meaningful opportunity to contest the evidence against her. State v. Hanson, 98 Wis. 2d 80, 86, 295 N.W.2d 209 (Ct. App. 1980), aff'd, 100 Wis. 2d 549, 302 N.W.2d 452 (1981). And because an involuntary mental health commitment is premised on either an individual's inability to care for herself or her danger to the public, due process

dictates that the government must demonstrate, by clear and convincing evidence, that the person is both mentally ill and dangerous to herself or others.[2] Marathon Cnty. v. D.K., 2020 WI 8, ¶¶27-28, 390 Wis. 2d 50, 937 N.W.2d 901 (citing O'Connor v. Donaldson, 422 U.S. 563, 576 (1975), and Addington, 441 U.S. at 432-33). As we recently held, the government must prove that an individual is "current[ly] dangerousness"; "it is not enough that the individual was" dangerous. Portage Cnty. v. J.W.K., 2019 WI 54, ¶24, 386 Wis. 2d 672, 927 N.W.2d 509.

[2] There is no dispute that the Fourteenth Amendment substantively protects the basic liberty of non-dangerous individuals against the government's attempts to deprive them of that liberty. See O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975); Vitek v. Jones, 445 U.S. 480, 491–92 (1980). There is some debate, however, about whether it is the Fourteenth Amendment's Due Process Clause or its Privileges or Immunities Clause that prevents states from infringing on an individual's inherent right to liberty. See, e.g., Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 847-48 (1992) (explaining that the Due Process Clause protects "a realm of personal liberty which the government may not enter"); Winnebago Cnty. v. C.S., 2020 WI 33, ¶¶47-70, 391 Wis. 2d 35, 940 N.W.2d 875 (Rebecca Grassl Bradley, J., dissenting) (concluding that "liberty interests may be vindicated under the Privileges or Immunities Clause"); Josh Blackman & Ilya Shapiro, Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States, 8 Geo. J.L. & Pub. Pol'y 1, 64 (2010) ("The Privileges or Immunities Clause is about individual liberty."). This academic debate has no bearing on K.E.K.'s challenge. After all, this court has already held that, based on the United States Supreme Court's "due process" jurisprudence, the government must prove current dangerousness. See Marathon Cnty. v. D.K., 2020 WI 8, ¶¶26-27, 390 Wis. 2d 50, 937 N.W.2d 901 (citing O'Connor, 422 U.S. at 576). Support for this basic liberty may also be found in the Wisconsin Constitution's protection of the people's "inherent right[]" to "liberty." Wis. Const. art. I, § 1.

¶49 These constitutional due process protections, however, have not always been the law in Wisconsin, and vestiges of our troubling history in this area remain. In the early 1970s, Wisconsin became the epicenter of civil commitment reform following a class-action lawsuit that contested Wisconsin's mental health commitment procedures. See Lessard, 349 F. Supp. 1078. There, a three-judge federal panel enjoined Wisconsin's commitment laws because Alberta Lessard, like many committed before her, was denied a series of key procedural protections:

- adequate notice of the proceedings against her;
- a prompt probable-cause hearing, despite being detained;
- the ability to invoke her right against self-incrimination or object to hearsay evidence;
- a heightened burden of proof commensurate with the deprivation of her liberty; and
- her right to counsel.

Id. at 1090-1103. Lessard's victory led to certain procedural changes, but our pre-Lessard ghosts continue to haunt us. Indeed, as of 2015, Wisconsin involuntarily commits its citizens diagnosed with mental illnesses at a higher rate than any other state.[3] Although we presume that the State's current mental

[3] Wisconsin involuntarily commits roughly 44 of every 1,000 persons diagnosed with a serious mental health disorder, far exceeding the average rate of other states (9 per 1,000). Substance Abuse & Mental Health Servs. Admin., Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice 12 (2019).

health commitment scheme is constitutional, we cannot ignore its history to the contrary. See Winnebago Cnty. v. C.S., 2020 WI 33, ¶14, 391 Wis. 2d 35, 940 N.W.2d 875.

¶50 Today, mental health commitments begin with a six-month initial commitment once the criteria set forth in Wis. Stat. § 51.20(1)(a) are met. See § 51.20(13)(g)1. (limiting the initial commitment period to not more than six months). As discussed above, the government must show that the person is both mentally ill and currently dangerous. § 51.20(1)(a); D.K., 390 Wis. 2d 50, ¶27. The government may prove the latter requirement if it can show, by clear and convincing evidence, that there is a substantial probability that, based on recent acts or omissions, the person will cause physical harm to herself or others in at least one of four ways. § 51.20(1)(a)2.a.-d. A fifth standard allows the government to prove current dangerousness by showing a substantial probability that, without treatment, an individual who has demonstrated an "inability to make informed treatment decisions" will "further decompensat[e]" to the extent that she cannot independently care for herself, "as demonstrated by both the individual's treatment history and his or her recent acts or omissions." § 51.20(1)(a)2.e.; State v. Dennis H., 2002 WI 104, ¶¶20-24, 255 Wis. 2d 359, 647 N.W.2d 851.

¶51 After the initial six-month commitment period, the government may extend the commitment for up to one year at a time. See § 51.20(13)(g)1., 3. At each extension hearing, the government must again demonstrate both mental illness and

current dangerousness. § 51.20(13)(g)3.; J.W.K., 386 Wis. 2d 672, ¶21. The evidence of current dangerousness must be "independent[]" of that introduced at the initial commitment proceeding. J.W.K., 386 Wis. 2d 672, ¶¶21, 24. Just as in the initial commitment proceedings, § 51.20(1)(a)2. governs the type of evidence the government can use to show current dangerousness.

¶52 But § 51.20(1)(am) provides an "alternative" evidentiary path. Under that provision, the government may "satisf[y]" the respective recent-act-or-omission requirements in each of the five dangerousness standards "by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." (Emphases added.) Thus, by its plain language, § 51.20(1)(am) permits the government to extend an individual's commitment based not upon evidence that an individual is dangerous but upon a prediction that she might become dangerous in one of the ways defined in § 51.20(1)(a)2.

¶53 That is the route Waupaca County took here. The circuit court extended K.E.K's commitment under the fifth standard of dangerousness, § 51.20(1)(a)2.e., by way of the § 51.20(1)(am) "alternative," basing its order on the predictions of two mental health professionals. Those witnesses forecasted that K.E.K., based on her treatment record, would become a proper subject for commitment under the fifth standard if treatment were withdrawn.

¶54 K.E.K. argues that extending her commitment based on this "alternative" to evidence of recent acts or omissions contravenes her Fourteenth Amendment rights in that it allows the government to extend her commitment without providing any evidence that she is currently dangerous. In rejecting her challenge, the majority opinion sidesteps the constitutional question, instead misinterpreting and improperly relying on J.W.K. A careful constitutional analysis of § 51.20(1)(am), however, reveals that it is facially unconstitutional.

II

¶55 The majority opinion errs in its premise that we "authoritatively determined" in J.W.K. that Wis. Stat. § 51.20(1)(am) is constitutional. See majority op., ¶26. There, however, we interpreted the language of § 51.20(1)(am) only to determine whether J.W.K.'s appeal challenging the sufficiency of the evidence was moot. We made no pronouncement either way about its constitutionality——an unsurprising result given that J.W.K. did not raise a constitutional challenge.

¶56 To the extent that J.W.K. addresses current dangerousness, its reasoning undercuts the majority's conclusion rather than supports it. The majority claims that § 51.20(1)(am) is constitutional because, per J.W.K., it allows the government to use "alternative" evidence to show that an individual "may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness." Id., ¶36 (quoting J.W.K., 386 Wis. 2d 672, ¶24). That is, the majority opinion accepts as "current" the dangerous behavior

that led to the individual's initial commitment, based on conjecture that this same behavior might manifest itself again if treatment is withdrawn. But J.W.K. rejected that very argument, explaining that the government may not extend an individual's commitment by resting solely on the evidence used to initially commit her. J.W.K., 386 Wis. 2d 672, ¶24 ("It is not enough that the individual was at one point a proper subject for commitment."). Simply put, J.W.K. provides no basis for a constitutional analysis of § 51.20(1)(am); it instead bolsters K.E.K.'s position that whatever evidence of dangerousness supported her initial commitment cannot satisfy the constitutional requirement that the government demonstrate she is dangerous right now. The majority opinion's mistaken reliance on and misinterpretation of J.W.K. stunts any actual constitutional analysis of § 51.20(1)(am).

¶57 A proper examination of the plain language of § 51.20(1)(am) reveals that it is facially unconstitutional because it allows the government to involuntarily commit someone who is not currently dangerous. Section 51.20(1)(am) substitutes the recent-act-or-omission requirements of § 51.20(1)(a)2. with a showing that there is a "substantial likelihood," based on the subject individual's treatment record, that the individual "would be a proper subject for commitment if treatment were withdrawn." (Emphases added.) The use of "would be" in tandem with an "if" clause forms a "future unreal conditional." As the label implies, such sentences deal with hypothetical futures based on some condition not currently

present. This phrasing redefines "is dangerous" to mean "might be dangerous if some future conditions are met."

¶58 The problem with relying on the future conditional language in § 51.20(1)(am) is compounded by the fact that the five standards of dangerousness are already predictions about future behavior. Each standard is based on a "substantial probability" that harm will occur. What saves the five standards from being unconstitutional in the initial commitment context is that each requires evidence of a recent act or omission that evinces dangerousness. See § 51.20(1)(a)2. Section 51.20(a)(am) dispenses entirely with that recent-act-or-omission requirement, allowing it to be "satisfied" with future speculation, thus layering uncertainty on top of uncertainty while never proving that an individual is in fact dangerous right now.

¶59 Section 51.20(1)(am)'s reliance on an individual's treatment record likewise does not establish proof of current dangerousness. An individual's treatment record will always include some past event of dangerous behavior; otherwise the individual could not have been committed in the first place. But in the commitment extension context, if the government's only evidence of dangerousness is that which led to the initial commitment, then it has no evidence of current dangerousness. See J.W.K., 386 Wis. 2d 672, ¶24. And without evidence of current dangerousness, an individual cannot be involuntarily committed. J.W.K., 386 Wis. 2d 672, ¶21; Foucha v. Louisiana, 504 U.S. 71, 77-78 (1992).

¶60 K.E.K.'s commitment extension illustrates just how divorced predictions about future dangerousness are from current dangerousness. Both the County's psychiatrist, Dr. Marshall Bales, and K.E.K.'s behavioral health case manager, Heather Van Kooy, confirmed that K.E.K was stable in an outpatient facility. They explained that K.E.K. was responding to treatment, that she had been taking her medication, and that she had committed no recent violent or threatening acts. Dr. Bales pointedly stated that K.E.K. had "not been dangerous over the last number of months." Although he noted that K.E.K. lacked insight into her mental illness and that she still talked and giggled to herself, he acknowledged that those symptoms are not necessarily dangerous behaviors. Ms. Van Kooy agreed that K.E.K.'s symptoms had not manifested in any dangerous behaviors or threats of harm to herself or others. Far from showing that K.E.K. was currently dangerous, Dr. Bales's and Ms. Van Kooy's testimony exemplify the disconnect between predictions about future dangerousness permitted under § 51.20(1)(am) and actual evidence of current dangerousness required by the Constitution and our precedent.

¶61 Failing to grapple with that disconnect, the majority opinion offers two last-ditch, but unavailing, arguments for upholding Wis. Stat. § 51.20(1)(am). First, it upholds § 51.20(1)(am) on the grounds that it "give[s] counties a more realistic basis by which to prove dangerousness." Majority op., ¶36. More realistic than what is unclear. Notwithstanding, there is nothing unrealistic about a standard

of proof that requires evidence of current dangerous behavior to show that someone is currently dangerous. If the government has no such evidence, perhaps the committed individual is, in fact, not currently dangerous.

¶62 To that, the majority opinion responds with its second defense of § 51.20(1)(am): the "revolving door" phenomena. This justification posits that without the "alternative" evidence permitted under § 51.20(1)(am), committed individuals will enter a "vicious circle of treatment, release, overt act, recommitment." Majority op., ¶36 (quoting State v. W.R.B., 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987)). Setting aside the fact that this judicially crafted rationale lacks any basis in the text or legislative history of § 51.20(1)(am), it does nothing to address the fact that § 51.20(1)(am) impermissibly redefines "currently dangerous." Instead, it assumes the truth of the constitutional violation——that the individual is not presently dangerous——while excusing that violation because the previously committed individual may meet the commitment requirements again.

¶63 I understand, to a point, the policy concerns underlying this revolving door reality for some. I recognize that an individual released from a mental health commitment may at some point cease treatment and again become a proper subject for commitment. I also recognize that simply extending an individual's commitment may be more expedient than having to start the commitment process anew should an individual's condition significantly deteriorate.

¶64 The Constitution, however, yields to neither good intentions nor expediency. Its protections are all the more important when faced with well-intentioned and efficient practices that ultimately amount to a violation of an individual's fundamental liberty. See Bonnett v. Vallier, 136 Wis. 193, 200, 116 N.W. 885 (1908) ("Good intentions in the passage of a law or a praiseworthy end sought to be attained thereby cannot save the enactment if it transcends in the judgment of the court the limitations which the Constitution has placed upon legislative power."); Kiley v. Chi., Milwaukee & St. Paul Ry. Co., 138 Wis. 215, 256, 119 N.W. 309 (1909) ("The Constitution was made to guard the people against the dangers of good intentions as well as bad intentions and mistakes. The former may excuse a void enactment, but never justify it."). Therefore, as concerning as the revolving door phenomenon may be, it cannot justify depriving individuals of their liberty without due process.

III

¶65 The government may constitutionally commit someone against her will only if she is mentally ill and currently dangerous. By its plain terms, Wis. Stat. § 51.20(1)(am) swaps the latter requirement for evidence of an individual's past conduct and uncertain predictions about her potential future dangerousness. Under no set of facts, however, can past records or speculative predictions, on their own, demonstrate current dangerousness. Accordingly, I conclude that § 51.20(1)(am)

facially violates the Fourteenth Amendment to the United States Constitution.

¶66 I therefore respectfully dissent.

¶67 I am authorized to state that Justice JILL J. KAROFSKY joins this dissent.

COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP1887 **Cir. Ct. No. 2017ME44**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE MENTAL COMMITMENT OF K. E. K.:

WAUPACA COUNTY,

PETITIONER-RESPONDENT,

V.

K. E. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: VICKI L. CLUSSMAN, Judge. *Affirmed*.

Before Fitzpatrick, P.J., Blanchard, and Graham, JJ.

¶1 BLANCHARD, J.[1] K.E.K. appeals two decisions of the circuit court: one to extend K.E.K.'s involuntary commitment and the other requiring involuntary medication and treatment. In challenging the order extending her commitment, K.E.K. argues that (1) the circuit court lacked competency to order involuntary recommitment because Waupaca County filed the petition after the time required by WIS. STAT. § 51.20(13)(g)2r. and (2) the recommitment paragraph, § 51.20(1)(am), is unconstitutional, both facially and as applied to K.E.K., on both vagueness and due process grounds. Regarding the ruling requiring involuntary medication and treatment, K.E.K. argues that the circuit court erred by failing to identify supporting statutory grounds and that the evidence is insufficient. We reject all of K.E.K.'s arguments and affirm.

Background

¶2 On November 22, 2017, the County filed an initial petition for examination seeking to commit K.E.K. under WIS. STAT. § 51.20(1)(a), more specifically under § 51.20(1)(a)2.e., known as the "fifth standard" of dangerousness. *See* ***State v. Dennis H.***, 2002 WI 104, ¶¶14, 33, 255 Wis. 2d 359, 647 N.W.2d 851 (fifth standard permits commitment of "mentally ill persons whose mental illness renders them incapable of making informed medication decisions and makes it substantially probable that, without treatment, disability or deterioration will result"). On December 8, 2017, following a jury trial, the circuit court entered an order committing K.E.K. for six months. On May 22, 2018, the

[1] This appeal was converted from a one-judge appeal to a three-judge appeal under WIS. STAT. RULE 809.41(3) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

County filed an evaluation, recommendation, and petition for recommitment seeking to extend K.E.K.'s commitment for an additional twelve months.[2]

¶3 K.E.K. filed a motion to dismiss the County's petition for recommitment on the ground that the circuit court lacked competency to proceed, because the County violated a statutory requirement under WIS. STAT. § 51.20(13)(g)2r. Specifically, the County failed to follow the requirement that petitions for recommitment must be filed at least 21 days before the expiration of the initial commitment. *See* § 51.20(13)(g)2r. The County conceded that it had filed only 17 days prior to expiration of K.E.K.'s original commitment order. The circuit court denied K.E.K.'s timeliness motion.

¶4 Separately, K.E.K. argued that, in order to satisfy due process requirements for recommitment, the County was required to establish that K.E.K. had engaged in a recent act supporting a new or continuing finding of dangerousness. K.E.K. further contended that WIS. STAT. § 51.20(1)(am) is unconstitutionally vague because it fails to define a key phrase contained within that paragraph, namely, "would be a proper subject for commitment if treatment were withdrawn," and there is no definition of that phrase in statutes or in case law. The circuit court rejected these arguments, concluding that the County was not required to present evidence of a recent act supporting a finding of dangerousness to meet its burden to establish that recommitment was appropriate. The court also at least implicitly concluded that § 51.20(1)(am) is not unconstitutionally vague.

[2] WISCONSIN STAT. § 51.20, as well as case law, uses the terms "recommitment" and "extension of a commitment" interchangeably. *See* ***Portage Cty. v. J.W.K.***, 2019 WI 54, ¶1 n.1, 386 Wis. 2d 672, 927 N.W.2d 509. We will generally use "recommitment."

¶5 The County's request for recommitment was tried to the court. We recount trial testimony as necessary to discussion below.

¶6 The circuit court found that K.E.K. was mentally ill and that there was a substantial likelihood that she would be a proper subject for commitment if treatment were withdrawn. The court issued an order extending K.E.K.'s involuntary commitment for the maximum period of twelve months. In addition, the court ordered involuntary medication and treatment during the period of recommitment. K.E.K. now appeals.

Discussion

¶7 We begin by addressing K.E.K.'s statutory and constitutional arguments regarding the recommitment order. After that, we address K.E.K.'s argument that there was insufficient evidence to support the court's involuntary treatment and medication order.[3]

[3] Given the timing of this decision, K.E.K.'s appeal of the recommitment and medication and treatment orders appears to be moot. *See* ***J.W.K.***, 386 Wis. 2d 672, ¶14 ("An appeal of an expired commitment order is moot."). We may consider moot issues if they fall within exceptions to the rule that moot appeals are generally dismissed. *See* ***id.***, ¶29 (listing several mootness exceptions including, for example, "'the constitutionality of a statute,'" and "an issue 'capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.'") (alterations and quoted source omitted); *see also* ***Outagamie Cty. v. Melanie L.***, 2013 WI 67, ¶80, 349 Wis. 2d 148, 833 N.W.2d 607 (addressing moot appeal of involuntary medication and treatment order based on multiple exceptions). The parties do not address the issue of mootness or the exceptions to dismissing moot appeals. We conclude that each of K.E.K.'s arguments sufficiently implicate one or more of the exceptions to mootness to warrant addressing her arguments on the merits.

I. The Recommitment Order

A. Whether the Circuit Court Lacked Competency

¶8 Our resolution of K.E.K.'s argument that the circuit court lacked competency turns on the proper interpretation of WIS. STAT. § 51.20(13)(g)2r. The construction of a statute is a question of law that appellate courts review without deference to the circuit court. ***DeMars v. LaPour***, 123 Wis. 2d 366, 370, 366 N.W.2d 891 (1985). Courts first determine whether the statutory language has plain meaning. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. In addition, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

¶9 WISCONSIN STAT. § 51.20 governs relatively short term involuntary commitments and recommitments. ***Fond du Lac Cty. v. Helen E.F.***, 2012 WI 50, ¶29, 340 Wis. 2d 500, 814 N.W.2d 179 ("[WIS. STAT.] ch. 51 is used for short term treatment and rehabilitation intended to culminate with re-integration of the committed individual into society," as opposed to WIS. STAT. ch. 55, which governs long-term care).

¶10 When a governmental entity (here, the County) seeks the recommitment of an individual already committed pursuant to WIS. STAT. ch. 51, the government must file an "evaluation ... and ... recommendation" at least 21

days before the expiration of the previously imposed commitment.[4] *See* WIS. STAT. § 51.20(13)(g)2r. Here, it is undisputed that, under this 21-day rule, the County filed its recommitment petition after the time set forth in the statute.

¶11 K.E.K. argues that the County's failure to meet the 21-day requirement deprived the circuit court of "competency" and, therefore, the recommitment order must be vacated. Specifically, K.E.K. argues that when a petitioner violates the mandatory directive that it "shall file" a recommitment petition "[t]wenty-one days prior to expiration of the period of commitment" found in WIS. STAT. § 51.20(13)(g)2r., this deprives the circuit court of competency to address the recommitment petition. The dispute here centers on the subdivision's later directive that "[a] failure ... to file an evaluation and recommendation under this subdivision does not affect the jurisdiction of the court over a petition for recommitment." The issue is whether this directive preserves court jurisdiction, but not court competency. *See* § 51.20(13)(g)2r. According to K.E.K., because this directive pertains to jurisdiction, it has no effect on competency. K.E.K. points out that cases such as ***City of Eau Claire v. Booth***, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, make clear that "jurisdiction" and "competency" are distinct concepts.

¶12 The County argues that the "jurisdiction" language in WIS. STAT. § 51.20(13)(g)2r. would be rendered meaningless by K.E.K.'s interpretation. According to the County, it would make no sense for the legislature to include

[4] There appears to be no dispute that the "evaluation ... and ... recommendation" referred to in WIS. STAT. § 51.20(13)(g)2r. may also be properly referred to as a "recommitment petition." *See* § 51.20(13)(g)2r. (using the phrase "petition for recommitment" as an apparent substitute for the somewhat cumbersome phrase "an evaluation of the individual and the recommendation of the department or county department regarding the individual's recommitment").

language preserving a court's jurisdiction if a late filing would cause the court to lose competency to act. That is, we understand the County to argue that K.E.K.'s interpretation is absurd, because the preservation of jurisdiction has no meaning if a court were to lose competency to do anything pursuant to that preserved jurisdiction.

¶13 In our view, K.E.K.'s argument assumes that the legislature's use of the term "jurisdiction" is consistent with the case law distinction between "jurisdiction" and "competency." As we now explain, we conclude that the only reasonable reading of "does not affect the jurisdiction of the court" is that courts retain competency to exercise jurisdiction. As a result, a petitioner's failure to comply with the 21-day filing time limit does not affect the court's competency to exercise jurisdiction.

¶14 K.E.K. is correct that precedent such as ***Booth*** explains that jurisdiction is distinct from competency. However, ***Booth*** also explains that subject matter jurisdiction is conferred by the Wisconsin Constitution and may not be curtailed by the legislature. The legislature may curtail the courts' competency to *exercise* jurisdiction in defined circumstances:

> Article VII, Section 8 of the Wisconsin Constitution provides, in pertinent part: "Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state ...." Subject matter jurisdiction, established by this section of our constitution, "refers to the power of a court to decide certain types of actions." Because this power is granted to circuit courts by our constitution, it cannot be "curtailed by state statute." *However, "a circuit court's ability to exercise the subject matter jurisdiction vested in it by the constitution may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction in individual cases."* Noncompliance with statutory mandates affects a court's competency and "a court's 'competency,' as the term is understood in

> Wisconsin, is not jurisdictional at all, but instead, is defined as 'the power of a court to exercise its subject matter jurisdiction' in a particular case."

Booth, 370 Wis. 2d 595, ¶7 (emphasis added; citations omitted). Thus, subject matter jurisdiction is conferred on our courts by our constitution and our legislature is powerless to confer or restrict such jurisdiction. It follows that, when the legislature provides that a petitioner's failure to observe the 21-day window to file "does not affect the jurisdiction of the court," it could not mean to address whether the circuit court does or does not have jurisdiction.[5]

¶15 For these reasons, the only reasonable reading of "does not affect the jurisdiction of the court" is that a failure to comply with the 21-day filing time limit does not affect a court's competency to *exercise* jurisdiction. Stated in the words of ***Booth***, "[n]oncompliance with statutory mandates affects a court's competency" to "exercise the subject matter jurisdiction vested in [the court] by the constitution." ***Id.***

¶16 Notably, although K.E.K. accurately describes the difference between jurisdiction and competency, she does not provide any alternative interpretation of "does not affect the jurisdiction of the court." If, as K.E.K. contends, the phrase solely implicates jurisdiction, and if, as ***Booth*** explains, the legislature is powerless to confer or restrict jurisdiction, what else could the phrase mean? K.E.K. does not provide an answer, and we discern none.

[5] It appears that the parties to agree that the phrase "jurisdiction of the court" in WIS. STAT. § 51.20(13)(g)2r. refers to *subject matter* jurisdiction of the court. K.E.K. acknowledges as much when she references subject matter jurisdiction while relying on a paragraph in ***Booth*** that discusses subject matter jurisdiction and competency. *See* ***City of Eau Claire v. Booth***, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738.

¶17 Accordingly, we agree with the circuit court that WIS. STAT. § 51.20(13)(g)2r. directs that a petitioner's failure to comply with the 21-day filing time limit does not affect a court's competency to exercise jurisdiction and, therefore, the circuit court here did not lose competency when the County filed the K.E.K. recommitment petition fewer than 21 days before expiration of the initial commitment.

B. Facial Constitutional Challenges

¶18 K.E.K. argues that part of the recommitment criteria in WIS. STAT. ch. 51 is unconstitutional because it violates substantive due process and is void for vagueness. The arguments hinge, or largely hinge, on the proposition that a portion of WIS. STAT. § 51.20(1)(am), addressing recommitments, is unclear. We disagree based on the following statutory interpretation discussion. After clarifying the meaning of the disputed language, we return to K.E.K.'s constitutional arguments.

1. The Meaning Of The Recommitment Subsection

¶19 K.E.K. argues that one part of the criteria found in WIS. STAT. § 51.20(1)(am) for the recommitment of an individual is hopelessly unclear. This is the criterion that "there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." We put that phrase in context, and then explain why we disagree with K.E.K.'s arguments.

¶20 The recommitment paragraph, WIS. STAT. § 51.20(1)(am), must be read together with the initial commitment paragraph, § 51.20(1)(a). Under WIS. STAT. ch. 51, a court may order an initial commitment if an individual is:

(1) mentally ill (required by § 51.20(1)(a)1.),[6]

(2) a proper subject for treatment (also required by § 51.20(1)(a)1.), and

(3) dangerous under one of the five alternative dangerousness standards (set forth in five subdivision paragraphs, § 51.20(1)(a)2.a.-e.).

See § 51.20(1)(a); WIS JI—CIVIL 7050. In evaluating the third prong of this test, each of the five dangerousness standards include a requirement of a recent act, for example, issuing threats or attempting suicide. *See* § 51.20(1)(a)2.a.-e. (example from subd. para. a.).

¶21 Turning to recommitment, before a committed individual whose initial commitment has not yet expired may be recommitted, the court must find that the same standards are met. S*ee* ***Portage Cty. v. J.W.K.***, 2019 WI 54, ¶18, 386 Wis. 2d 672, 927 N.W.2d 509 (a petitioner seeking recommitment must "prove the same elements by clear and convincing evidence: (1) the individual is mentally ill and a proper subject for treatment, and (2) the individual is dangerous.") (citing WIS. STAT. § 51.20(1)(a), (am)). The only material difference between initial commitment and recommitment in this context is that, if the individual has been treated for a mental illness as the result of a § 51.20(1) commitment, meeting the third prong of the test no longer necessarily requires proof of a recent act and, instead, may be satisfied by a showing "that there is a substantial likelihood, based on the subject individual's treatment record, that the

[6] Following the parties' lead, we use "mentally ill" as shorthand for "mentally ill, developmentally disabled, or drug dependent." *See* WIS. STAT. § 51.20(1)(am). We note that, at least in some case law, what we now list as prongs one and two of the commitment test are described as a single "element." *See e.g.*, ***J.W.K.***, 386 Wis. 2d 672, ¶18, ("(1) the individual is mentally ill and a proper subject for treatment, and (2) the individual is dangerous").

individual would be a proper subject for commitment if treatment were withdrawn." Sec. 51.20(1)(am). This is the language that K.E.K. argues is unclear.

¶22 K.E.K.'s argument fails, because this language means the following: a petitioner seeking recommitment may, as an alternative to establishing one of the five grounds for dangerousness through recent acts, establish one of those grounds by proving a "substantial likelihood" that, if current "treatment were withdrawn," the "individual would be a proper subject for commitment" under the test applicable to initial commitments. *See* ***J.W.K.***, 386 Wis. 2d 672, ¶¶18-19, 23-24 (describing WIS. STAT. § 51.20(1)(am) as an alternate evidentiary path to establish a substantial likelihood that behaviors and acts manifesting dangerousness would be exhibited if treatment were withdrawn). This is true for the following reasons.

¶23 First, it is undisputed, and not subject to reasonable dispute, that the phrase "the individual would be a proper subject for commitment" in WIS. STAT. § 51.20(1)(am) is a reference to an initial commitment—that is, the individual up for potential recommitment could be properly committed a first time. We cannot discern what other "commitment" § 51.20(1)(am) could be referring to. Thus, the requirement that an individual "be a proper subject for commitment" for recommitment purposes means that, if treatment were withdrawn, the individual would be a proper subject for commitment under the test for an initial commitment described above: mentally ill, a proper subject for treatment, and dangerous.

¶24 Second, language in WIS. STAT. § 51.20(1)(am) that we have not quoted to this point further demonstrates that this provision is connected to each of the five dangerousness standards described in subd. (1)(a)2. Specifically, the language immediately preceding the disputed clause refers to each type of recent

act evidence corresponding to each dangerousness standard in describing how para. (1)(am) provides an alternative means to meet each of the five standards in the recommitment context.[7]

¶25 Third, it is clear that the phrase in WIS. STAT. § 51.20(1)(am), "the individual would be a proper subject for commitment," means that recommitment requires a finding that, if treatment were withdrawn, there is a substantial probability that the individual would be dangerous under at least one of the five alternative dangerousness standards in the initial commitment test. This is because, once more, there is no other reasonable reading of the language. K.E.K. proposes two alternatives, but we conclude that neither is reasonable.

¶26 K.E.K. suggests that this phrase means that a petitioner "is relieved of proving dangerousness at all." We disagree. The phrase has the evident meaning that we have just explained. And, our supreme court has made clear that WIS. STAT. § 51.20(1)(am) requires a finding of dangerousness in the recommitment setting, just as § 51.20(1)(a) requires a finding of dangerousness in the initial commitment setting. *See* ***J.W.K.***, 386 Wis. 2d 672, ¶¶18-19, 23-24.

[7] The following is a more complete quote:

> [T]he requirements of a recent overt act, attempt or threat to act under par. (a)2.a. or b., pattern of recent acts or omissions under par. (a)2.c. or e., or recent behavior under par. (a)2.d. may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

WIS. STAT. § 51.20(1)(am).

¶27 K.E.K. also suggests that this phrase requires proof supporting the particular dangerousness standard—*i.e.*, the same one of the five alternative dangerousness standards—used for the individual's initial commitment. We disagree. No language in WIS. STAT. § 51.20(1)(am) suggests such a limitation. The paragraph says "a proper subject for commitment" and does not say anything to the following effect: "a proper subject for commitment looking to the same dangerousness standard relied on during the initial commitment."

¶28 In sum, we agree with the brief filed by the attorney general, which states that it "is clear from the plain language of" WIS. STAT. § 51.20(1) that "[t]o prove dangerousness—either initially or on extension—the government must show that the individual would [evince] one of the five standards of dangerousness if treatment were withdrawn."[8]

¶29 Our discussion above resolves K.E.K.'s primary argument regarding the clarity of WIS. STAT. § 51.20(1)(am). Nonetheless, we choose to address another supporting argument in K.E.K.'s brief-in-chief.

¶30 K.E.K. asserts that, "[i]n lieu of [the five alternate dangerousness standards], WIS. STAT. § 51.20(1)(am) substitutes a lower, undefined threshold: 'would be a proper subject for commitment if treatment were withdrawn.'" This appears to misread § 51.20(1)(am) as fully displacing the dangerousness requirements in § 51.20(1)(a)2. Rather, § 51.20(1)(am) has the effect of adding a

[8] This quote from the attorney general's brief shows that K.E.K. is wrong when she contends that "[t]he Attorney General does not say whether, at the recommitment stage, the County must prove that withdrawing treatment would cause K.E.K. to become dangerous under the same standard used to justify her original commitment or simply any standard of dangerousness."

means by which dangerousness may be established in the recommitment context by modifying the type of proof that may be used to establish dangerousness under the five standards. *See* ***J.W.K.***, 386 Wis. 2d 672, ¶19. That is not a lower or undefined non-dangerousness standard. It is a coherent way of defining dangerousness when current treatment may be preventing dangerous behavior.

¶31 To sum up, K.E.K. fails to demonstrate that the disputed phrase in the recommitment subsection is unclear. It has clear meaning. The party seeking a recommitment order must prove a "substantial likelihood" that, if current "treatment were withdrawn," the "individual would be a proper subject for commitment" under the test applicable to initial commitments. We turn to K.E.K.'s facial constitutional challenges.

2. Facial Constitutional Challenge: Void For Vagueness

¶32 Having rejected K.E.K.'s argument that the meaning of the recommitment standard in WIS. STAT. § 51.20(1)(am) is unclear, it follows that her void for vagueness argument must fail. That is, we have established that § 51.20(1)(am) has a clear meaning and therefore it cannot be true that the statute is "'so obscure'" that individuals of "'common intelligence must necessarily guess at its meaning and differ as to its applicability.'" ***Dennis H.***, 255 Wis. 2d 359, ¶26 (quoting ***State v. Curiel***, 227 Wis. 2d 389, 414-15, 597 N.W.2d 697 (1999)).

3. Facial Constitutional Challenge: Substantive Due Process Requirement Of Dangerousness

¶33 K.E.K. and the attorney general agree that, to satisfy substantive due process, a commitment or recommitment pursuant to WIS. STAT. § 51.20(1) must be supported by a showing that the individual is both mentally ill and dangerous to self or others. This agreement flows from several cases. *See*, *e.g.*, ***Foucha v.***

Louisiana, 504 U.S. 71, 78 (1992) ("[K]eeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness."); ***Dennis H.***, 255 Wis. 2d 359, ¶¶13, 31, 36 (the government does not have a legitimate interest in confining individuals who are not mentally ill or who do not pose a danger to themselves or others).

¶34 However, citing ***O'Connor v. Donaldson***, 422 U.S. 563, 575-76 (1975), K.E.K. contends that substantive due process specifically requires a determination of *current* dangerousness to justify recommitment, as distinct from a determination of a risk of future dangerousness or dangerousness that is contingent on events that have not yet come to pass. K.E.K. argues that WIS. STAT. § 51.20(1)(am) fails to require a determination of current dangerousness because it "authorizes the involuntary commitment of a mentally ill person who is not dangerous to himself or others" at the time of the court's recommitment decision.

¶35 We explain below why we conclude that K.E.K.'s argument fails because it is based on the flawed proposition that *current* dangerousness can be shown only by proof of *recent* behavior exhibiting dangerousness. In addition, her argument is precluded by decisions of our supreme court. We first note our agreement with two points that K.E.K. makes, and then turn to what we consider flawed reasoning and to case law that forecloses her argument.

¶36 The County and the attorney general seem to suggest that K.E.K.'s due process argument is rebutted by the explanation in case law that the purpose of WIS. STAT. § 51.20(1)(am) is to avoid a "revolving door." *See* ***State v. W.R.B.***, 140 Wis. 2d 347, 411 N.W.2d 142 (Ct. App. 1987). We disagree. Briefly stated, ***W.R.B.*** explains that the recommitment standard is needed to prevent a "revolving

door" of commitment-release-commitment, etc., in light of the following potential problem: it is often not possible in the recommitment context for the petitioner to meet the dangerousness standards applicable to initial commitments precisely because a currently committed individual is being successfully treated. *See* ***id.*** at 351-52. While the court clearly explains the nature of a potential revolving door problem, we agree with K.E.K. that ***W.R.B.***'s explanation does not address whether the legislature adopted a *constitutional means* of addressing the potential problem.

¶37 We also agree with K.E.K. that WIS. STAT. § 51.20(1)(am) does not require proof of *recent acts* of dangerousness. However, we do not agree that this means that the subsection does not require proof of *current* dangerousness.

¶38 Both WIS. STAT. § 51.20(1)(a) (initial commitments) and § 51.20(1)(am) (recommitments) require a showing of *current* dangerousness, although neither requires a showing that individuals actually harmed themselves or others. Both paragraphs speak in terms of the presently existing probability or likelihood that individuals will harm themselves or others in the future. *See* § 51.20(1)(a) (using "substantial probability" language); § 51.20(1)(am) (using "substantial likelihood" language).[9] Both paragraphs impose, in different ways, the same burden on the government. The government must prove that there is a substantial probability or a substantial likelihood that subject individuals will harm themselves or others in the absence of treatment. In the words of the attorney general, "whether the government uses a 'recent overt act' or the consequences of

[9] K.E.K. does not suggest that there are any constitutional implications to the difference between "substantial probability" and "substantial likelihood."

withdrawing treatment to prove dangerousness, the dangerousness being proved is current dangerousness."[10]

¶39 This rationale is consistent with statements by our supreme court. The court has made clear that WIS. STAT. § 51.20(1)(am) "provides a different avenue for proving dangerousness if the individual has been the subject of treatment for mental illness immediately prior to" recommitment proceedings. ***J.W.K.***, 386 Wis. 2d 672, ¶19. The court has further noted that "[e]ach extension hearing requires proof of *current* dangerousness," ***id.***, ¶24 (alteration in original), whether proven through one of the five alternate standards of dangerousness using recent acts or through § 51.20(1)(am), ***J.W.K.***, 386 Wis. 2d 672, ¶18. *See also* ***Waukesha Cty. v. J.W.J.***, 2017 WI 57, ¶20, 375 Wis. 2d 542, 895 N.W.2d 783 (referring to WIS. STAT. § 51.20(1)(am) as a means of "satisfy[ing] the 'dangerousness' prong").

¶40 K.E.K. further contends that her assertion that WIS. STAT. § 51.20(1)(am) does not require proof of current dangerousness is exemplified by the purported holding of a one-judge opinion, ***Waukesha Cty. v. Kathleen R.H.***, 2010AP2571-FT, unpublished slip op. (WI App Feb. 23, 2011). According to K.E.K., this opinion "hold[s] that §51.20(1)(am) does not require proof that withdrawing treatment would result in dangerousness." We disagree. Nowhere does the opinion say that WIS. STAT. § 51.20(1)(am) does not require such proof.

[10] We observe that, even if a presently accurate showing of future dangerousness could be said to be distinct from a showing of current dangerousness, the former showing may satisfy substantive due process requirements under certain circumstances. *See* ***Kansas v. Hendricks***, 521 U.S. 346, 358, 360 (1997) (upholding state law based on its requiring "a finding of future dangerousness," where that finding is "link[ed] … to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior").

Rather, the opinion disposes of the notion that proof that the individual in that case "would be a danger to herself or others if treatment were withdrawn" did not need to be supplied by proof "apart from that contained in her treatment record." *See* ***Kathleen R.H.***, 2010AP2571-FT, ¶8.

C. As-Applied Challenges To Constitutionality

1. As-Applied: Void For Vagueness

¶41 K.E.K.'s brief-in-chief has a subsection purporting to demonstrate that, even if WIS. STAT. § 51.20(1)(am) is not unconstitutionally vague on its face, it is unconstitutionally vague as applied to her. However, we do not discern a recognizable as-applied vagueness argument in this section of K.E.K.'s brief.

¶42 K.E.K. first points to testimony supporting the view that she would not be dangerous to herself if she were not recommitted, and asks "[w]hat more could [she] do to avoid endless recommitments?" This appears to be an illustration of K.E.K.'s facial vagueness argument, not an as-applied vagueness argument. Moreover, we note that K.E.K.'s question misapprehends the pertinent inquiry in the assessment of whether the standards governing recommitment hearings are unconstitutionally vague. The issue is not whether K.E.K. is able to avoid recommitment. Circumstances outside her control, including mental illness, may make it impossible for her to avoid recommitment. The issue is whether someone of normal intelligence would understand the circumstances under which an individual is subject to recommitment under WIS. STAT. § 51.20(1)(am), when read together with § 51.20(1)(a). We have already addressed this issue and determined that the statute is not unclear.

¶43 K.E.K. next asserts that "separate actors [in this proceeding] interpret[ed] [WIS. STAT.] § 51.20(1)(am) differently." She describes what she contends are statements demonstrating differing statutory interpretations made by witnesses, the County's attorney, and the circuit court. This again could be an illustration of K.E.K.'s facial vagueness argument, not an as-applied vagueness argument. Alternatively, such subjective views of what is required under WIS. STAT. § 51.20(1)(am) might be a basis for arguing that the circuit court applied an incorrect standard of law.[11] However, the views do not support an as-applied vagueness argument.

¶44 To the extent that K.E.K. points to these allegedly differing views to support her argument that the meaning of WIS. STAT. § 51.20(1)(am) is unclear, this adds nothing to her facial vagueness challenge.

¶45 For these reasons, we reject K.E.K.'s as-applied vagueness argument.

2. As-Applied: Substantive Due Process Requirement Of Dangerousness

¶46 K.E.K. argues that, even if WIS. STAT. § 51.20(1)(am) does not violate substantive due process on its face, the statute violates substantive due process as applied to her. She provides three supporting arguments. We address and reject each.

[11] K.E.K. does not develop an argument, as an alternative to her challenges to the constitutionality of WIS. STAT. § 51.20(1)(am), that the circuit court applied the incorrect standards under the statute.

¶47 First, K.E.K. argues that the County was required to prove that she was currently dangerous, but that the circuit court found credible testimony supporting the view that K.E.K. was *not* currently dangerous to herself or others. We fail to understand in what sense this is an as-applied substantive due process argument. Regardless, the argument is meritless. It is based on either of two incorrect premises: that substantive due process cannot be satisfied by a current finding of future or contingent dangerousness, or that such dangerousness cannot be proven if there is no evidence of recent behavior showing dangerousness.

¶48 K.E.K. points to testimony and a finding by the circuit court here that both address K.E.K.'s status *while under treatment*. However, as we have explained, the recommitment dangerousness question is not necessarily whether K.E.K. has engaged in recent acts suggesting dangerousness. Instead, the question may be, as the circuit court stated here: "whether or not at this point, if treatment was withdrawn, [K.E.K.] would then become a proper subject for a new commitment" because she would then pose a danger to herself or others.

¶49 Second, K.E.K. argues that "at the recommitment trial the County did not offer any evidence—in particular, any treatment records from her original commitment—to prove that K.E.K. was *ever* dangerous to herself or others." This might be a sufficiency-of-the-evidence argument, but it is not an as-applied due process argument.

¶50 Third, K.E.K. argues that WIS. STAT. § 51.20(1)(am) violates substantive due process because it impermissibly "removes the 'recent acts or omissions' requirement from the 5th [§ 51.20(1)(a)2.] standard." Again, this is not an as-applied argument because nothing about it is unique to the proceedings involving K.E.K. Rather, as K.E.K. acknowledges, her third argument applies to

"K.E.K. or anyone recommitted under the 5th standard." As a facial challenge, we have already resolved this topic.[12]

II. The Involuntary Treatment And Medication Order

¶51 Having addressed K.E.K.'s arguments about the recommitment order, we now turn to the order for involuntary treatment and mediation. K.E.K. makes three arguments under the heading "[t]here was insufficient evidence to support the circuit court's involuntary treatment order." It does not appear to us that all three are sufficiency-of-the-evidence-arguments. But, labeling aside, we attempt to address these three arguments as best we understand them.

A. Alleged Failure Of Circuit Court To Identify The Subsection

¶52 K.E.K. argues that the circuit court, in imposing the involuntary medication order, improperly failed to identify whether the court was relying on WIS. STAT. § 51.61(1)(g)3m. (involuntary treatment for individual committed under fifth standard of dangerousness) or § 51.61(1)(g)4. (involuntary treatment for individual committed under a dangerousness standard other than the fifth standard, or while a petition for such a commitment awaits final determination). The court's written order includes the findings that K.E.K. is mentally ill and that she "is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to [her] condition in order to make an informed choice as to whether to accept or refuse psychotropic medications."

[12] We agree with K.E.K. that the County's reliance on ***Terry R.H. v. Marathon Cty.***, No. 1994AP2097, unpublished slip op. (WI App Mar. 14, 1995), is improper. Although this unpublished opinion is authored, it pre-dates July 1, 2009. Therefore, with exceptions that do not apply here, it falls within the rule that such decisions may "not be cited in any court of this state as precedent or authority." *See* WIS. STAT. RULE 809.23(3).

¶53 As an initial matter, we question whether K.E.K. preserved this issue for appeal. We see no place in the record at which K.E.K.'s counsel argued that something more was required than the findings in the standard order form used by the circuit court. Accordingly, it appears that this challenge has been forfeited.

¶54 More importantly, K.E.K. fails to explain why it matters that the court failed to specify whether it was relying on WIS. STAT. § 51.61(1)(g)3m. or § 51.61(1)(g)4. K.E.K.'s entire argument on this topic is as follows:

> The circuit court's first error in ordering involuntary medication and treatment for K.E.K. came when it failed to identify which statutory subsection it was applying—§51.61(1)(g)3m or §51.61(1)(g)4. The two overlap, but they are not identical. [***Outagamie Cty v.***] ***Melanie L.***, [2013 WI 67,] ¶¶61-63, [349 Wis. 2d 148, 833 N.W.2d 607.] Section 51.61(1)(g)3m, which incorporates the 5th standard, imposes many more requirements and is thus much stricter.

K.E.K. makes no attempt to explain how § 51.61 interacts with WIS. STAT. § 51.20(1) and she does not specify the "many more requirements" or why they might matter. Accordingly, we reject the argument as undeveloped.

B. Alleged Failure Of Circuit Court To Identify Evidence

¶55 K.E.K. argues that the circuit court failed to identify the evidence that it relied on or to give a reason for ordering involuntary medication. The County notes that the court made some findings regarding K.E.K.'s medication history following her initial commitment, but concedes that the court "did not go into further detail concerning the statutory criteria concerning a medication order." However, the County relies on the well-established rule that "[w]hen a court does not expressly make a finding that is necessary to its decision, we may assume it made that finding, and we review the record to determine if the presumed finding

is clearly erroneous." ***Gittel v. Abram***, 2002 WI App 113, ¶49, 255 Wis. 2d 767, 649 N.W.2d 661. K.E.K. does not develop a rebuttal to this point, conceding it.

C. Alleged Failure Of Circuit Court To Recognize The Absence Of Evidence

¶56 K.E.K. argues that the circuit court failed to "recognize the absence of clear and convincing evidence to support an involuntary treatment order under either [WIS. STAT. §] 51.61(1)(g)3m. or §51.61(1)(g)4." We assume that K.E.K. means to argue that the evidence is insufficient to satisfy either § 51.61(1)(g)3m. or § 51.61(1)(g)4.b.

¶57 In part, K.E.K. asserts that the "County had to demonstrate, at a minimum, [that she had a] history of noncompliance with taking prescribed medication." The only support K.E.K. provides for this requirement is to cite ***Melanie L.***, 349 Wis. 2d 148, ¶¶75-78, 97. We find no such requirement in those paragraphs. ***Melanie L.*** does explain that an individual's history of noncompliance is relevant, *see* ***id.*** ¶75, but it does not say that proof of prior noncompliance is required.

¶58 K.E.K. also asserts that the County was required to prove that she had an "inability to apply the advantages and disadvantages of treatment to her own condition." We understand this to be an assertion that the evidence was insufficient to support the circuit court's written finding that K.E.K. was "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to ... her condition in order to make an informed choice as to whether to accept or refuse psychotropic medications."

¶59 This argument is undeveloped. She does not summarize the evidence most favorable to the circuit court's finding and then explain why that

evidence is insufficient. Instead, in a few sentences unsupported by record citations, K.E.K. briefly summarizes limited testimony that, viewed in isolation, might support a finding that she did have the sort of understanding needed to make an informed choice about medication. And even this limited discussion is flawed. We give examples of both problems.

¶60 First, K.E.K. asserts that "Dr. Bales admitted that [K.E.K.] *had* at least a 'superficial understanding' of the advantages, disadvantages and alternatives to treatment." (Emphasis added.) Although K.E.K. does not supply a record citation with this assertion in her argument section, this appears to be a reference to a factual summary in the background section of her brief in which she cites to page 19 of the trial transcript. Looking there, we conclude that K.E.K.'s assertion is misleading. Dr. Bales did not say that K.E.K. "had" a superficial understanding. Rather, he agreed that K.E.K. was able to "express" an understanding—something very different. *See* ***Melanie L.***, 349 Wis. 2d 148, ¶¶53-55 (explaining distinction between a subject's ability to express understanding of recommended medication and subject's ability to apply that understanding to subject's circumstances). More importantly, Dr. Bales went on to opine that K.E.K. could not apply any understanding that she did have in order to make an informed medication choice.

¶61 Second, K.E.K. asserts that "the County did not offer any *admissible* evidence of K.E.K.'s noncompliance with prescribed medication." (Emphasis added.) K.E.K. does not explain her qualifier "admissible." In particular, she does not explain why the testimony of Dr. Bales that K.E.K. had a history of noncompliance with her medications was inadmissible.

¶62 Third, K.E.K.'s failure to come to grips with testimony that supports the circuit court's finding includes testimony by Dr. Bales that K.E.K. did not understand her mental illness. This also includes testimony by K.E.K.'s case manager, Heather Van Kooy. Van Kooy testified that, based on her monthly interactions with K.E.K. and K.E.K.'s "history [with] our department," K.E.K. "will no longer take her medications, become more unstable, and potentially [become] a danger to herself" if she no longer receives "the treatment and care that she's receiving currently."

Conclusion

¶63 For these reasons, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN, CIRCUIT COURT, WAUPACA COUNTY

For Official Use

IN THE MATTER OF THE CONDITION OF

K [redacted] E. K [redacted]
Name of Subject

☐ Amended

Order of
☐ **Commitment**
☒ **Extension of Commitment**
☐ **Dismissal**

FILED
JUN - 6 2018
WAUPACA COUNTY, WI
ANGELA DAHLE, REGISTER IN PROBATE

06/04/1971
Date of Birth

Case No. 17-ME-44

A hearing was held on (Date) June 6, 2018.

THE COURT FINDS:

☐ 1. Grounds for ☐ commitment ☐ extension of commitment have not been established.

☒ 2. Grounds for ☐ commitment ☒ extension of commitment have been established.
The subject is
a. ☒ mentally ill.
☐ drug dependent.
☐ developmentally disabled.
b. dangerous because the subject evidences behavior within one or more of the standards under §§51.20(1) or (1m), Wis. Stats. *(except for proceedings under §51.20(1)(a)2.e., Wis. Stats.)*.
c. a proper subject for treatment.
d. ☒ a resident of WAUPACA County, Wisconsin.
☐ a nonresident of the state of Wisconsin.
☐ an inmate of a Wisconsin state prison.

☒ 3. The dangerousness of the subject is likely to be controlled with appropriate medication administered on an outpatient basis.

☒ 4. The subject has been adjudicated pursuant to 18 USC 922(g)(4) as a "mental defective" or committed to a mental institution.

☐ 5. Other: _____

THE COURT ORDERS:

☐ 1. This matter is dismissed.

☒ 2. The subject is committed for 12 months from the date of this hearing to the care and custody of the
a. ☒ WAUPACA County Department established under §§51.42 or 51.437, Wisconsin Statutes.
b. ☐ Department of Health Services.

The maximum level of treatment shall be
a. ☐ a locked ☐ an unlocked inpatient facility.
The reception facility shall be _____.
Transportation to the facility shall be provided by
☐ the sheriff.
☐ Other: _____
b. ☒ outpatient with conditions. The conditions of outpatient commitment on the attached document are incorporated into this order. A violation of any condition may result in the subject being taken into custody by law enforcement for inpatient treatment.

☒ 3. The subject is prohibited from possessing any firearm. Federal law provides penalties for, and you may be prohibited from possessing, transporting, shipping, receiving, or purchasing a firearm, including, but not limited to, a rifle, shotgun, pistol, revolver, or ammunition, pursuant to 18 U.S.C. 921(a)(3) and (4) and 922(g)(4). This prohibition shall remain in effect until lifted by the court. Expiration of the mental commitment proceeding does not terminate this restriction.

☐ a. Any firearm owned by subject shall be seized by _____.
The subject's firearms may be found at the following location(s):_____
_____.
Any person residing at the/these locations is required to cooperate with law enforcement attempts to seize firearms. Failure to cooperate may result in contempt sanctions.

☐ b. As an alternative to seizure, the following person is designated to store any firearm(s) until the firearm restriction order has been canceled: _____.

c. The subject is informed of the requirements and penalties under §941.29, Wis. Stat. including imprisonment for up to 10 years, a fine not to exceed $25,000 or both.

d. The court clerk shall notify the department of justice of the restriction unless the department has been previously informed of a prohibition for this subject.

☐ 4. Other: _____

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

BY THE COURT:

Circuit Court Judge

Hon. Vicki L. Clussman
Name Printed or Typed

June 20, 2018
Date

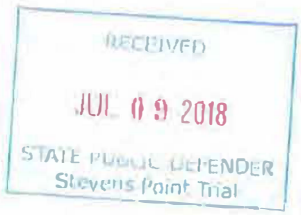
DISTRIBUTION:
1. Original – Court
2. Subject
3. Attorney
4. Treatment Provider
5. Detention facility (if different)

STATE OF WISCONSIN : CIRCUIT COURT : WAUPACA COUNTY

BRANCH NO. II

FILE NO. 17-ME-44
COURT TRIAL

IN THE MATTER OF:



K[redacted] E. K[redacted]

BEFORE: HONORABLE VICKI L. CLUSSMAN
Circuit Judge

DATE: JUNE 6, 2018

APPEARANCES: DAVID G. BEEN, Assistant Corporation Counsel
Appearing on behalf of Waupaca County

KATE DRURY, State Public Defender
Appearing on behalf of Ms. K[redacted], who
is appearing in person

Dana Amundson, RMR, CRR
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

APPENDIX D

INDEX

WITNESSES:

	DIRECT	CROSS	REDIRECT	RECROSS
DR. MARSHALL BALES	12	20	--	--
HEATHER VAN KOOY	37	41	54	56
COLLEEN BARRIBEAU	58	63	--	--
K[redacted] K[redacted]	77	82	84/86	--

EXHIBITS:

	IDENTIFIED	OFFERED	RECEIVED
1 -	22	--	--
2 -	24	--	--
3 -	33	33	33
4 -	43	44	44
5 -	65	--	--

TRANSCRIPT OF PROCEEDINGS

being present for the testimony of the doctor, because it was my intent to call him first.

ATTORNEY DRURY: I don't. She's -- the county is allowed to designate a representative to sit at the table and I understand that the -- Your Honor, may I go just off the record?

THE COURT: Yes.

(Discussion held off the record.)

ATTORNEY DRURY: No, your Honor, I think that we -- I talked to my client -- we can go back on the record and we're prepared to proceed with calling Dr. Bales first.

THE COURT: Okay.

ATTORNEY BEEN: County will call Dr. Marshall Bales.

M A R S H A L L B A L E S,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION:

BY ATTORNEY BEEN:

Q. Dr. Bales, could you please state your full name and spell your last name for the record.

A. Marshall Bales, B-A-L-E-S.

Q. And Doctor, how are you currently employed?

A. I'm a psychiatrist, I do work in an outpatient clinic in Appleton. And I work at Brown County Mental Health, and I do

independent court evaluations.
Q. All right. And can you give the Court a brief summary of your education and training.
A. Yes. Kansas University undergraduate and Medical School, Chicago Medical School residency, I'm board certified in psychiatry, I have a Wisconsin license and have practiced psychiatry full-time for 25 years.
Q. All right. And have you -- you indicated that your present employment is with Outagamie County?
A. Yes.
Q. And doing independent evaluations, is that what you've been doing for 25 years, or can you just briefly summarize your work history?
A. I worked in the Veteran's Administration for many years. And I've done both inpatient and outpatient psychiatry. I have been employed at Winnebago Mental Health Institute, although I recently retired from there. But basically I've practiced inpatient or outpatient psychiatry full-time for a long time.
Q. And in your present role, as well as past roles, have you had regular opportunities to do evaluations for the purpose of evaluating mental status?
A. Countless times.
Q. All right. And are you able to give a rough estimation of how often you do such evaluations?

A. These kind of evaluations, or psychiatric evaluations?
Q. Well, let me ask both. So for the purpose of court proceedings, how often do you do evaluations?
A. I've done thousands now. I've been doing these court evaluations for about five years and I've done many hundreds and hundreds. And I do the same thing on an outpatient basis and inpatient.
Q. All right. As part of that, are you -- have you received specific training related to doing court evaluations?
A. Not really. I've learned through the years, but I'm not a forensic psychiatrist, if that's what you mean.
Q. Okay. I'm just curious what -- if there were specific training to that. Specifically, as part of court evaluations, are you asked on a regular basis to assess dangerousness?
A. Yes. Whether for court evaluations or it's what I do all day long, whether inpatient, outpatient, for the court, or for -- it's what I do.
Q. All right. And --
A. For years.

ATTORNEY BEEN: And I would just move the Court to find Dr. Bales to be certified as an expert in the field of psychiatry.

THE COURT: Any objection, Attorney Drury?

ATTORNEY DRURY: We would oppose.

THE COURT: You oppose?

ATTORNEY DRURY: Has the county introduced evidence of the CV or just the testimony?

ATTORNEY BEEN: Just through testimony.

ATTORNEY DRURY: So I mean, that would be my problem. And I'm sure the Court can make a decision on the admissibility of that.

THE COURT: I will find that Dr. Bales is an expert in the area of psychiatry.

BY ATTORNEY BEEN:

Q. Doctor, in your capacity, as a medical professional, have you had involvement with K[redacted] K[redacted]?

A. Yes, one time.

Q. And you had an opportunity to do a mental status evaluation concerning K[redacted]?

A. Yes.

Q. And did you also have an opportunity to review records and receive other information and observe her as part of your evaluation?

A. Yes.

Q. Can you tell the Court what records you had available to you to evaluate?

A. I reviewed the Evergreen records. I reviewed the some Winnebago Mental Health Institute records. I don't have

those with me right now. But reviewed the prior emergency detention document. I also spoke to K[redacted]'s mother, who is very supportive of her. I spoke also to the group home staff and discussed with them how she's been doing.

Q. You also have had opportunities to have personal observations of K[redacted] as well?

A. Yes.

Q. And can you tell us how much time and what -- basically how much time you spent with her?

A. I spent about 30 minutes with her, and another probably 15 or so minutes was with the group home staff in reviewing some of their notes with the group home staff. But it was at least a half an hour that I spent with K[redacted] and she was cooperative with that meeting.

Q. All right. And as a result of your examination and your review of the information received, are you able to give us an opinion to a reasonable degree of medical certainty as to her current diagnosis?

A. Yes.

Q. And what is your opinion?

A. She suffers from schizophrenia, paranoid type.

Q. All right. And based on her diagnosis and your review of the records, do you believe that she is currently treatable?

A. Yes.

Q. And can you summarize your, I guess, support of that opinion?

A. Yes. Actually plain and simple, she has not been rehospitalized during this last number of months. She's had -- she has been doing pretty well at this Evergreen. And other than she talks to herself a lot, but she -- I can talk about that some -- but she's had only one police contact. I've not seen it either, but it was just minimal compared to some of the past ones. So she's had less police contact, she's been maintained on an outpatient basis, and she has not been dangerous over the last number of months, through any of the records I've seen. To her credit, and I was really impressed with that she has responded to treatment at least partially in, in my opinion.

ATTORNEY DRURY: Your Honor, I would move to strike the reference to having police contact during the pendency of the commitment, because the county didn't provide me with that confrontation.

THE COURT: Any objection?

ATTORNEY BEEN: For the purposes of today's hearing, no. I mean, I guess the other issue is there's been a jury trial, there's been evidence received, and there was prior testimony. So it's not as if the fact-finder would be unaware of any prior contact. But for the purposes of this hearing and the doctor's testimony, I don't object.

THE COURT: I will order that that reference be stricken.

BY ATTORNEY BEEN:

Q. Okay. Doctor, based on your review of the treatment record and evaluation, do you believe that there's a substantial likelihood that K[redacted] would be a proper subject for commitment if treatment were withdrawn?

A. Yes.

Q. And can you explain that a little bit?

A. Well, I've explained I do believe she's improved with her current treatment interventions care and safe keeping at this group home, Evergreen and with medications. But she has distinctive lack of insight into her mental illness and that impedes her treatment in general.

And so if she is off commitment or if treatment is withdrawn, she will, in my opinion, almost certainly stop her medications, she will almost certainly leave Evergreen. She mentioned to me that she would live with family in Illinois, but her mother cited advancing age, and just being uncomfortable with the stress of this, due to her mother's age. So I don't think she has any kind of set housing set-up. And I'm concerned that off medications, which I believe she would stop them, and without stable housing, she would decompensate and become a proper subject for commitment, in my opinion, again.

Q. Thank you. Doctor, have you -- during your meeting with her, did you attempt to explain the advantages and disadvantages of accepting psychotropic medications?
A. Yes.
Q. And do you believe that she is capable of expressing an understanding of the advantages and disadvantages of accepting treatment and the alternatives?
A. It was superficial. She basically could express -- she kept -- what she did keep expressing was that she's not mentally ill, and that I talk to myself and that is not mental illness, she said. And homeless isn't -- homelessness is not mental illness. But -- and neither of those are wrong, but they're -- she is mentally ill.
Q. Well, let me ask the follow-up question. Even if she's able to express a superficial understanding of the advantages and disadvantages of accepting treatment and the alternatives, do you believe that she is substantially capable of applying that understanding of the advantages, disadvantages, and alternatives to her illness in order to make an informed choice as to whether to accept or refuse psychotropic medication?
A. No.
Q. All right. And in addition to what you've already testified to, concerning your, I think you said, nearly certainty that she will stop taking meds, do you have any

other opinion -- or information to add in support of that opinion?

A. She has a history of being noncompliant with psychotropics and she -- I forget if she told me she was going to stop them or not, I truly forget. But I firmly believe she will stop her medications sooner or later, if she is off commitment, probably sooner, in my opinion. I can't state -- now she is on an injectable, so that will last up to a month. But I think the history and her presentation suggests she will not pursue voluntary treatment if not on commitment. Whether medications or treatment in general, she will not pursue voluntary treatment.

Q. In your opinion, would medications have a therapeutic value for K[redacted]?

A. Yes.

Q. And would any medications that she is -- or I didn't ask you -- is she currently prescribed medications?

A. Yeah, yes.

Q. And would any of the medications that she's prescribed unreasonably impair her ability to prepare for or participate in any subsequent legal proceedings?

A. No.

ATTORNEY BEEN: I have no further questions.

THE COURT: Attorney Drury?

CROSS-EXAMINATION:

BY ATTORNEY DRURY:

Q. I have some, your Honor. Dr. Bales, first you testified on direct that you relied on some notes from Evergreen; is that right?

A. Yeah.

Q. And Evergreen is the outpatient treatment facility that K[redacted] lives at now?

A. Yes, I went through those notes.

Q. You testified that you didn't have those notes with you?

A. Oh, I didn't have the old Winnebago notes, I do have the Evergreen notes.

Q. And the Evergreen notes that you have are from what time period to what time period?

A. I have the month of May.

Q. Okay. Well, that makes this a lot shorter.

A. I have --

ATTORNEY DRURY: Your Honor, may I approach?

THE COURT: You may.

ATTORNEY DRURY: Can I have this marked? Sorry Dave, I should have given this to you first. Thank you.

Q. So Dr. Bales, I'm going to be handing you what's been marked as Exhibit No. 1, if the judge would permit me to do that?

THE COURT: I'm sorry?

ATTORNEY DRURY: Do I have permission to approach?

THE COURT: Yes, you do.

ATTORNEY DRURY: Thank you.

Q. Is what has been marked as Exhibit No. 1 consistent with the notes you reviewed?

A. Yes.

Q. Okay. So in terms of K[redacted]'s placement at Evergreen, you reviewed other records?

A. I have this, so I don't need this, but I have the same records, exact same ones.

Q. Sure, that's fine.

A. So I am in receipt of those.

Q. Okay, great, thank you. I'll just reference this, this is just so we have the record there?

A. Yes, okay.

ATTORNEY DRURY: Your Honor, I wonder -- I'm going to be referencing this calendar -- I wonder if your Honor has a suggestion where I put it so counsel and the witness might be able to see, I'm thinking over by the jury box?

THE COURT: Yeah, I think maybe over there somewhere.

ATTORNEY DRURY: Okay. Attorney Been, can you see this okay?

ATTORNEY BEEN: Yes, thank you.

BY ATTORNEY DRURY:

Q. And Dr. Bales can you see this okay?

A. Adequately, I think.
Q. Okay. All right. So Dr. Bales, you reviewed Evergreen notes for the month of May, which I'm highlighting in green. But would it be fair to say that K[redacted] was first placed at Evergreen on January 20th of 2018?
A. I believe so.
Q. And you haven't reviewed -- to support your opinion -- any notes in January of 2018, February of 2018, March of 2018, April of 2018?
A. No. But I asked about her how she was doing and that's all I can offer the Court. I focused on May because that's the most recent.
Q. Would it be fair to say that May would be sort of the most important month to your analysis of whether an extension of the commitment would be appropriate?
A. It's all important, but I can tell you I'm mainly focused on May. I did have some records talking about her mental health issues in quote years gone by. But yes, I did focus on May.
Q. All right. And then I imagine that you also reviewed records by her treating psychiatrist, Dr. Ambas.
A. I did have some access to those, I don't have those with me, though.
Q. Would you recognize those if you saw them again?
A. Yes.

ATTORNEY DRURY: Okay, your Honor, may I approach?

THE COURT: You may.

BY ATTORNEY DRURY:

Q. Thank you. I'll have this marked as Exhibit No. 2. Dr. Bales, I'm handing you what's been marked as Exhibit No. 2.

A. Okay.

Q. Could you identify for the Court what Exhibit No. 2 is?

A. That's Dr. Ambas' notes.

Q. And the time period that I've handed you of Dr. Ambas' notes ranges from January 10 of 2018 to May 23 of 2018; does that appear to be right?

A. Yes.

Q. That is also the period of the commitment?

A. Yes.

Q. Do you think in forming your opinion you've relied on all of these notes?

A. I have indirectly. I've not had all those notes, though.

Q. Okay.

A. But I've been informed of them and am generally aware of her outpatient psychiatric care.

Q. How did you --

A. But I did not get provided all of those.

Q. So how did you become aware of her general outpatient well-being, if not through relying on Dr. Ambas' notes?

A. I had all these records, I had the crisis records.
Q. And the crisis records -- just pause so we can go through them one by one.
A. Okay.
Q. The crisis records would have been the records generated in November of 2017 when the initial commitment was done?
A. I have some of those. But so you have some records I don't have, plain and simple.
Q. Okay.
A. And yet I think that I have had enough information truly to state my opinions to a, quote, reasonable degree -- if not beyond that -- of medical certainty, okay.
Q. Okay. And I understand that's your opinion, we're just trying to establish the facts supporting that opinion because I'm a little bit confused at this point.
A. Sure.
Q. So you are unaware that on March 21 of 2018, K[redacted] met with Dr. Ambas?
A. I didn't know the date.
Q. And you are unaware that on March 21 of 2018, Dr. Ambas indicated that K[redacted] -- K[redacted]'s, excuse me -- condition had improved to the extent that he thought, quote, she was already showing some stability of symptoms of her mental illness, so she may not need to have her commitment extended?
A. That's his opinion, that's --

Q. Well, why don't you do me this favor, am I reading that incorrectly on the note?
A. Is that in this Exhibit 2?
Q. It would be, Doctor. It would be the progress note dated 3-21 of 2018. And it would be the paragraph preceding mental status examination heading.
A. I don't doubt that's what he said, so that's what he said. And I know Dr. Ambas, I know him, he's a good doctor. So that if that's what he said, that's what he said.
Q. But that wasn't a fact that you took into consideration when you formed your opinion?
A. I have been asked to see if I would assess the situation because there were concerns. And there's been many people involved. And that she did need her commitment extended. Did he -- he said may not need, but he was, you know, that's what he said.
Q. Doctor, why don't I ask you this, Dr. Ambas met with K[redacted] on January 10 of 2015; is that right?
A. Yes.
Q. And he met with her on January 31 of 2018; is that right?
A. I have no idea.
Q. Does it indicate that in those records?
A. When exactly? I don't -- if he did, he did.
Q. Why don't you check Exhibit No. 2 to see if I'm wrong.

A. Well, I'm sure you're not wrong.

ATTORNEY BEEN: I guess I would object. He's indicating that a lot of these records he didn't even have. So I'm not sure how he can testify to Dr. Ambas' records and what dates that there were specific meetings.

THE WITNESS: Yeah, but --

ATTORNEY BEEN: Doctor.

THE WITNESS: The key thing -- yeah, I'm sorry.

THE COURT: I'll sustain the objection.

BY ATTORNEY BEEN:

Q. Okay. Would you agree that a doctor who sees K[redacted] on a monthly basis for an extended period of time might be more familiar with her situation than a doctor who has spent a half hour with her one time?

A. They should be.

Q. Okay.

A. I'm not in his situation with people, so certainly he should be.

Q. I haven't --

A. Okay, I'm sorry.

Q. -- haven't asked a question yet, we're going to transition into a different line of questioning now. You characterize your 30 minute contact with K[redacted] as her being cooperative, right?

A. She was.

Q. And when you spoke with her for those 30 minutes, you didn't personally observe her doing any self-talking?
A. No.
Q. She was able to carry on the conversation with you?
A. She -- I will use the phrase, she held it together.
Q. Okay.
A. And to her credit, she was going on, she was fine.
Q. So these reports of self-talking that you have gotten, you've gotten from the Evergreen notes and other collateral reports that have been submitted to you; is that right?
A. Yes.
Q. You indicated that according to the records you've reviewed in the course of the commitment, K[redacted] has improved her status regarding her mental health condition?
A. I believe she has improved.
Q. And you're not aware of notes indicating that after her medications were adjusted on March 21 of 2018, that Evergreen staff noticed a substantial decline in her condition?
A. The Evergreen staff has seen ongoing psychotic thinking, both before and after May as being constant. They say talking to self, and it's throughout the Evergreen -- the month of May.
Q. But it would be the Evergreen staff that would have better knowledge of the symptoms than yourself; is that right?

A. I don't know. I -- I rely on the records to form my opinions, that's what I can tell you. And the Evergreen documentation suggests clear ongoing psychotic thinking.
Q. And that was documentation from the month of May?
A. Yes.
Q. The self-talking that was reported here, it is true that the self-talking didn't contain any type of suicidal threats?
A. That's correct. And --
Q. And it's true that the self-talking didn't create any sort of direct threat at harm to another person?
A. Not that I know of. And I looked all through these records. I have not seen that she's had any suicidal behavior, nor has she been assaultive that has been substantiated.
Q. And she hasn't otherwise had, you know, these attempts to try to assault people that have been interfered with?
A. Nothing that's been substantiated. There was one concern and it was not substantiated and so to her credit, I'm not going to rely on that. I did make note of it in my report that there was some incident and it was not substantiated so I respect that.
Q. And under your care, the 30 minutes you spent with her, you did not observe K[redacted] act violently or threaten violence?
A. No. She was cordial, present, cooperative with me.

Q. Okay. So I want to talk to you about the knowledge you have of her behaviors prior to the commitment extension -- or the commitment being issued in this case. Do you have -- have you reviewed records in connection with her detention?
A. I have a document from November 6, 2017 regarding a petition for examination. There's a report, but -- I have some documents, we apparently have -- both have different records. But I'm familiar with some of the incidents leading to her original commitment.
Q. Okay. So the conduct that led to her original commitment, it would be unfair to characterize that conduct as suicidal, correct?
A. I know of no suicidal gestures or attempts ever, I do not. I'm under oath and I to her credit, I don't know of any suicidal behavior ever.
Q. And do you -- I'm sorry that we have to go through this?
A. No, that's fine.
Q. But it's a slightly different question than the question I've asked you before and I'm trying to make the record clear. So you would also agree that ever, you were unaware of any direct or indirect threat of harm to another person, correct?
A. Would you repeat that, please?
Q. Sure. Have you ever -- through the review of the documents during the commitment and prior to the

commitment -- become aware of any direct or indirect threat to other people made by K[redacted]?

A. No. There was the unsubstantiated incident. So otherwise I don't know, and I looked through all the month of May and I did not see that she had been assaultive to herself or others in the month of May. And some of the prior -- I don't know -- I asked about things and in the previous months and no one knew of assaultive or self-injurious behavior during that time either.

Q. And there are no records prior to the commitment being issued of K[redacted] -- I guess we've covered that, so I can move on. You would agree that during the course of the commitment, K[redacted] has been under an order to treat?

A. Yes.

Q. That order to treat requires her to take certain medications?

A. Yes.

Q. Some of those medications are injectable?

A. Yes.

Q. And some of those medications are in pill form?

A. Yes.

Q. And that through the course of her commitment she has taken all of the injectable medications at the time that she was supposed to take the injectable medications?

A. My understanding is because she has to.

Q. Okay.
A. She does comply as far as I know. There were a few reports -- was she cheeking or not, or -- but she takes her medications with prompting as directed in general.
Q. And sometimes she takes her medications without prompting, doesn't she?
A. I don't know. I believe so. But she -- it's my opinion I do not think she would comply long-term with psychotropics off commitment.
Q. And I understand what your opinion is, but again, we're getting at the facts that are underlying that opinion.
A. Okay.
Q. So you know, through the commitment period are you able to point to a document or specific date where it was alleged that she was cheeking her medicine? Do you know who observed that?
A. I can't -- I can't cite any distinct incidents where they -- but they do carefully watch her to make sure she takes her medication.
Q. So she hasn't had to be, like, held down --
A. No.
Q. -- to have any medications administered to her?
A. No.
Q. You would agree that in general persons who carry the diagnosis that you believe K[redacted] has, which is? There's so

many different iterations of it, I don't want to make a mistake.

A. Schizophrenia.

Q. Schizophrenia, okay. So there are people with schizophrenia in the community who are unmedicated, correct?

A. Yes.

Q. And that by virtue of having that diagnosis, it doesn't necessarily render an individual dangerous, correct?

A. Correct.

Q. Your report, you know, kind of outlines some behaviors here that I want to go over, and I think it makes sense to introduce your report into evidence here. Could I have this marked as Exhibit No. 3. Does the county have any objection to moving this into evidence, or did you prefer --

ATTORNEY BEEN: No.

ATTORNEY DRURY: Okay, I'd ask that Exhibit No. 3 be moved into evidence.

THE WITNESS: Oh, I've got a copy, but I'll set it right here, I've got a copy.

THE COURT: Any objection to Exhibit 3 being entered?

ATTORNEY BEEN: No.

THE COURT: I will order that Exhibit 3 be received into evidence.

ATTORNEY DRURY: Okay, thank you.

Q. Now, Doctor, just so I understand your testimony today, when you testified that Ms. K[redacted] is talking in different voices, it's your testimony today that that is not necessarily dangerous behavior, correct?
A. Correct.
Q. And some of the, like, the giggling that you reference in your report also wouldn't be considered dangerous?
A. Correct.
Q. Nor would, you know, making animal sounds, right?
A. Correct.
Q. So you cite these examples, all of which would have happened in the month of May?
A. Yes.
Q. And you cite these examples as reason for which the treatment has been successful in part, but also unsuccessful in part?
A. Yes.
Q. Ideally, if the treatment were a hundred percent successful, K[redacted] wouldn't be exhibiting that type of behavior, right?
A. Yes.
Q. But she is exhibiting that type of behavior, so the treatment in your opinion has not been a hundred percent successful?
A. Correct. She's having, you know, ongoing talking to

self, reflecting, I believe, response to internal psychotic stimuli.

Q. But the fact that she is responding to this internal psychotic stimuli, as you put it, doesn't necessarily make her dangerous?

A. Yes.

Q. It just shows that her symptoms are not a hundred percent controlled?

A. Yes.

Q. When you were talking to K[redacted] about the side effects that she experiences as a result of these medications, you discussed with her the possibility that the medications will lead to weight gain?

A. I believe we talked -- we did talk about that. Although it's -- as I explained usually INVEGA in particular, it's usually weight neutral, and I explained that. But weight gain can happen with any of these psychotropics. And I always -- it's not just the ladies, it's the guys too that care about that. And I mentioned that.

Q. And diabetes can result as a consequence?

A. Extremely rare.

Q. Muscle rigidity can be a consequence of this medication?

A. It happens. And I explained she's on a side effect pill for what they call EPS. And I went over that, she's on Cogentin for that side effect.

Q. These drugs can also cause cardiac arrythmia; is that right?
A. I've not seen it, but it can. If you get a PDR, it's an encyclopedic on what can happen. But I don't believe I reviewed cardiac issues because they're so uncommon and rare.
Q. Are you aware that K[redacted] suffers from cardiac arrythmia?
A. I don't know in detail, but she may. I put -- I feel she's generally medically healthy, and I don't know on her cardiac status.

ATTORNEY DRURY: Your Honor, I have no further questions for this witness.

THE COURT: Attorney Been?

ATTORNEY BEEN: I have no further questions.

THE COURT: All right, is there any objection to Dr. Bales being excused?

ATTORNEY DRURY: No.

ATTORNEY BEEN: No.

THE WITNESS: Okay, thank you.

THE COURT: You're excused then, Doctor.

THE WITNESS: Thank you.

THE COURT: Mm-hmm, thank you.

ATTORNEY BEEN: Thank you, Doctor. The county would call Heather Van Kooy.

THE CLERK: Please raise your right hand.

HEATHER VAN KOOY,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION:

BY ATTORNEY BEEN:

Q. Ms. Van Kooy, could you please state your full name and spell your last name for the record.

A. Heather Van Kooy, V-A-N K-O-O-Y.

Q. And how are you currently employed?

A. As a behavioral health case manager with Waupaca County Human Services.

Q. And how long have you been so employed?

A. I've been employed with the department for 16 years.

Q. And in your capacity as a case manager, are you familiar with K[redacted] K[redacted]?

A. Yes.

Q. And how are you familiar with her?

A. I'm her current case manager.

Q. And how long have you been her case manager?

A. Since November of 2017.

Q. And can you just generally explain to the Court what your role is as it pertains to K[redacted] as a case manager?

A. As a case manager, monitoring the -- in K[redacted]'s case monitoring her commitment, making sure that she has adequate care, adequate shelter, coordinating care and treatment with

the other providers, and generally just overseeing her care.
Q. Do you also have personal contact with her?
A. Yes.
Q. And how frequently do you have contact?
A. Approximately once per month.
Q. Okay. Other than trying to see her once per month, you also rely on other records and reports in fulfilling your position as case manager, correct?
A. Yes.
Q. And is it also your role -- or let me just ask -- you, in your role as case manager, signed a document concerning an extension of the commitment?
A. Yes.
Q. And so you, as case manager, had requested that this extension occur?
A. Yes.
Q. And based on your involvement with the case, why do you believe that an extension was warranted?
A. I believe an extension is warranted because without the treatment and care that she's receiving currently, I believe that she will no longer take her medications, become more unstable, and potentially a danger to herself as a result of that.
Q. Now, when you indicate that you believe she will stop taking medications, what information are you relying on in

having that opinion?
A. That would be based on history of our department working with her.
Q. All right. And in your opinion, since you've been involved with her, have you -- do you have an opinion as to whether she's doing better or worse than when you first became involved?
A. When I first became involved in late November, early December, she is doing better than she was at that time. There was a point during this past six months where she was doing better than she is right now. But at this point, I believe she's better than she was six months ago, yes.
Q. Okay. So just picking -- well, not picking apart, but specifying, clarifying your answer -- you said there was a period when she was doing better than she is now; when would that have been?
A. Within the first couple of weeks to couple of months after she was released from inpatient hospitalization.
Q. Okay. And would that be during the early period of being at Evergreen?
A. Yes.
Q. All right. What are your concerns currently when you say that she's not doing as well? In what ways?
A. In the ways that she has been reported to have more incidents of responding to voices, to being more agitated,

and just in general appears to be symptomatic.
Q. All right. And there were some questions earlier about a medication change, are you aware when that medication change occurred?
A. I believe it was either March or April of this year.
Q. All right. And understanding that you're not a profession -- or a qualified professional to testify regarding medication, do you -- are you aware of whether behaviors have been different before and after the medication change?
A. There was an increase in her symptoms after the medication change.
Q. All right. Are you -- you indicated that you were concerned for her stopping her medications, based on her history with the department, are you aware of prior instances when she has stopped following through when she wasn't on commitment?

ATTORNEY DRURY: Your Honor, if the county is going to elicit this type of information, I think the county likely had an obligation to disclose evidence of such to me prior to the hearing. The county has not. The notes I have received from Heather -- excuse me, Ms. Van Kooy -- are for the pendency of the commitment.

THE COURT: So you haven't received records prior to November of 2017 from the department?

ATTORNEY DRURY: From the department, no -- from the county, no.

THE COURT: I will sustain the objection.

BY ATTORNEY BEEN:

Q. In your contacts with K[redacted], does she demonstrate insight into having a mental illness?

A. No.

ATTORNEY BEEN: I have no further questions.

THE COURT: Attorney Drury?

ATTORNEY DRURY: Thank you, your Honor.

CROSS-EXAMINATION:

BY ATTORNEY DRURY:

Q. Ms. Van Kooy?

A. Yes.

Q. Okay. Ms. Van Kooy, you've been with the department for 16 years?

A. Yes.

Q. You handle probably a very large case load?

A. It's not that large.

Q. Great, how large is it?

A. I believe right now I have about 15 people I'm working with.

Q. Okay, totally manageable. And you have been trained as a social worker?

A. Yes.

Q. By going to schools and by keeping up with CLE's?
A. Yes.
Q. Are you licensed?
A. I have a certification through the State of Wisconsin.
Q. Okay. Which is different from a license, but it's still a certification?
A. Yes.
Q. Okay. And through your history with the department, have you always worked with individuals who have been alleged to be mentally ill?
A. I have for 14 years.
Q. Okay. And in your training and experience, I imagine that you would agree that note-taking is a relatively important responsibility of your job?
A. Yes.
Q. You have to document what is happening in the case both so that your memory is accurate, right?
A. Yes.
Q. And because you know that these notes might be used by the department in the future to make decisions?
A. Yes.
Q. Decisions such as whether to extend a commitment hearing?
A. Yes.
Q. So you make it a point to keep thorough notes about your

contacts that you have with a client that you're supervising?
A. Relevant contacts, yes.
Q. Okay. And what is a relevant contact in your opinion?
A. There are contacts that sometimes are made with community members, that if we don't have necessarily an open case, they're not -- they're not made into an open case and therefore there's not record of that.
Q. Not relevant. But one of the 15 people on your case load contacts you, you make a point to write that down, correct?
A. Direct contact with them, yes.
Q. And if someone from Evergreen called you about a situation that was happening with K[redacted], you also would make a point to write that down, right?
A. Yes.
Q. And you've reviewed your notes before testifying today?
A. Yes.
Q. And you found them to be complete and accurate summary of your contact with K[redacted] through the pendency of the commitment?
A. Yes.
ATTORNEY DRURY: Okay. Your Honor, can I have this marked as Exhibit No. 4?
BY ATTORNEY DRURY:
Q. I should ask you, Ms. Van Kooy, do you keep these notes

as a regular matter of business?
A. I don't know what you mean by that.
Q. Do you prepare these notes for court hearings only?
A. No.
Q. Or do you keep them as part of your job?
A. Part of my job.
Q. And do you write down the information when you receive the information?
A. I often write it down in a notebook, handwrite it, and then at some point I relay it into a more professional note in our system.
Q. Okay. So you have this system where you're taking notes in a different place, but you're plugging them in and it's the same thing that you plug in, right?
A. Yes.
Q. And do you take notes like this not just in K[redacted]'s case, but in all the cases that you supervise?
A. Yes.

ATTORNEY DRURY: Your Honor, I'd move Exhibit 4.

THE COURT: Any objection?

ATTORNEY BEEN: No.

THE COURT: Exhibit 4 will be received.

BY ATTORNEY DRURY:
Q. In these notes I want to go over some of the documented contacts that you had with K[redacted] through the pendency of her

hearing. And unfortunately, I should have organized these, I just printed it off how I got it. But I'm going to start chronologically, which means I'm going to start towards the back. And really what I'm interested in is January 19 you had contact with K[redacted]. Now this would have been the date that K[redacted] was discharged from Gateway and was placed at Evergreen, right?

A. Yes.

Q. And you had contact with her on that date because you were actually involved in transporting K[redacted] to Evergreen?

A. Yes.

Q. And prior to that you were involved in, you know, figuring out the placement and setting it up so that she had a place to go under the commitment order?

A. Yes.

Q. So you saw K[redacted] at that period of time, and then a short time later you saw her on January 31 here in Waupaca County?

A. Yes.

Q. And I should note that Evergreen is an outpatient residential facility that is located in Juneau County?

A. Yes.

Q. And the driving distance is approximately an hour and a half?

A. Yes.

Q. So when K[redacted] goes to the doctor, she actually comes back to Waupaca County to go to the doctor?
A. Yes.
Q. And you make it a point to be at those doctor's appointments so you can check in with her?
A. If I'm available, yes.
Q. And on that March 31 date -- excuse me, January 31 date -- K[redacted] also saw Dr. Ambas at that point?
A. I believe so, yes.
Q. Okay. You saw her again on February 21, which was also the same date that she had an appointment?
A. Yes.
Q. And that in between January 31 and February 21 of 2018, it doesn't appear that you documented any contacts with K[redacted]; that wouldn't be abnormal?
A. No.
Q. Okay. So when you checked in with K[redacted] on February 21, the next time you had contact with her was March 13 and that was a contact that was made over the phone; does that sound right?
A. I'd have to refer to the record here, quick.
Q. Go ahead.
A. What was it, March 13?
Q. Yes.
A. Okay, yeah.

Q. Okay. So in between there, it looks like you had made some collateral contacts with K[redacted]'s family members to see whether transfer to Illinois was an appropriate option for her?

A. Yes.

Q. K[redacted]'s mother resides in Illinois?

A. Yes.

Q. K[redacted]'s daughter resides in Illinois?

A. Yes.

Q. And in fact on March 8 there is a note that's written by a colleague of yours indicating that K[redacted] is stable at that point, right?

A. March 8?

Q. Mm-hmm.

A. Yes.

Q. And did you disagree with your coworker based on the contact that you had with K[redacted]?

A. Do I disagree with that note?

Q. Yes.

A. No.

Q. Now, there was a doctor's appointment on March 21 that K[redacted] attended that you did not attend?

A. Right.

Q. So you can't really testify as to what happened there, but you would say that around this period of time, K[redacted]'s

behavior, which had been very stable, did not do as well?
A. If that was -- I believe that was around the time that, yes, that medication change was made and we started to see some deterioration.
Q. So prior to this March 21 date, would it be fair to say that you did not regularly witness K[redacted] responding to internal stimuli?
A. From January 31 to March 21, is that what you're asking?
Q. The part of the outpatient would be important, so January 19 to March 21 about.
A. Did I personally witness? No, I did not.
Q. And in consulting with those people in Evergreen, did you have concerns over whether she was self-talking during this period of time?
A. I don't recall specific events up until that time. It became much more intense after that.
Q. Okay. So the change that became more intense, let's define what that change was. You testified on direct that that change was more agitation according to you, right?
A. Yes.
Q. Incidents where she would be self-talking, she'd be responding to internal stimuli as you put it?
A. Yes.
Q. And apart from that, you said in general she was more symptomatic; what do you mean by that?

A. There were more frequent instances of the responding to herself, pacing, arguing with herself, using different voices, making different sounds.
Q. All self-talking?
A. Those are what I would explain as symptoms.
Q. So all self-talking symptoms?
A. Some agitation with other residents at the home, too.
Q. Let's talk about that, on April 2 K[redacted] was in an altercation with another person that lives at Evergreen, right?
A. Was April 2 the one that resulted in a slap in the face?
Q. Nope. April 2 is where K[redacted] was attacked by another resident verbally who called her a bitch and a dyke.
A. Okay.
Q. And tried to barge into the bathroom when she was using it.
A. Okay.
Q. Were you aware that these other residents had displayed this aggressive behavior towards K[redacted] when she was placed there?
A. I did read in the notes, yes.
Q. Now just to be clear, K[redacted] is placed at a location where there are 11 other males residing at Evergreen?
A. I'm not sure of the number, but several males, yes.
Q. And she's the only female?

A. Yes.
Q. So there was an incident where there was another resident who seemed to be the primary aggressor in that situation?
A. Okay.
Q. Are you aware of that from your contact with Evergreen?
A. Yeah, it would have been in the same notes that you have, yes.
Q. And you've reviewed those notes, right?
A. Yes.
Q. And you're making your opinion based on the review of those notes?
A. Yes.
Q. And you would agree after that incident, K[redacted] spent more time isolating herself in her room?
A. I don't know. I honestly can't answer that.
Q. Okay.
A. I don't know how often she was in her room prior to that either.
Q. Okay.
A. I just know more about the symptoms, as opposed to where she was at the time.
Q. Because you're not there on a day-to-day basis?
A. Right.
Q. You're seeing her, as you said, approximately once a

month?
A. Right.
Q. You're not observing her everyday?
A. Right.
Q. And in fact, the last time that you saw her prior to this petition being filed was on April 25 of 2018?
A. Yes.
Q. And April 25 of 2018 was also a time when K[redacted] was visiting her doctor?
A. When she was what?
Q. Visiting her doctor, Dr. Ambas?
A. Yes.
Q. You were present at that hearing. You were aware that Dr. Ambas didn't make any medication change on that date?
A. Yes.
Q. Even though there had been some deterioration?
A. Yes.
Q. These incidents where you are aware -- where you claim that K[redacted] was responding to voices, you're not aware of her making any threats of self-harm?
A. No.
Q. Not aware of her making any threats to harm another person?
A. No.
Q. You're not aware -- apart from the incident that

happened on May 17 that involved the police -- you're not aware of any allegation of physical aggression?
A. No.
Q. You are aware that on May 17, when the police were called, that K[redacted] was not charged with any crime as a result of that contact?
A. Right.
Q. Doctor used the term unsubstantiated; do you disagree with his term, yes or no?
A. No.
Q. In the past, you have interacted with K[redacted] when she has not been medicated?
A. Yes.
Q. This incident -- for example, prior to the commitment she was not medicated?
A. Yes.
Q. And when she was not medicated, you've seen K[redacted] come to you for help to try to get her driver's license?
A. Yes. She was trying to get to Social Security, I believe, yes.
Q. So she was trying to get to Social Security as well?
A. I don't know about her driver's license, I just know Social Security, yes.
Q. So you don't know that you helped her try to get a Wisconsin identification card at one point in time?

A. I did not, a different case manager may have.
Q. Okay. K[redacted] applied to you for a government phone when she was off her medications?
A. With her other case manager, she perhaps did.
Q. She has availed herself to resources in the community, such as a homeless shelter when she's been without housing?
A. Yes.
Q. When looking for housing, she has requested government subsidized housing instead of regular housing?
A. She requested it, yes.
Q. She's gotten herself on Wisconsin Health Care System?
A. Yes. I believe that was all with the assistance of her case manager, yes.
Q. She applied for Food Share?
A. I believe with the assistance of her case manager, yes.
Q. K[redacted] receives Social Security Disability Income?
A. Yes.
Q. K[redacted]'s mother is what they called a trustee for that income?
A. She receives the checks and then mails them out to her, yes.
Q. So K[redacted] isn't directly receiving money, but there's a system in place that helps her manage money?
A. It's not to help her manage her money, her mother receives the checks and gives them to K[redacted].

Q. Okay. During this incident when K[redacted] was committed, you didn't have to bring her to the hospital because she was malnourished, did you?

A. No.

Q. You didn't have to bring her to the hospital because she had some other medical concern that needed to be addressed in connection with this incident?

A. No.

Q. Has -- why don't I ask you this -- had K[redacted]'s condition in -- well -- strike that. I don't want to ask that. Your Honor, I have no further questions of this witness?

THE COURT: Anything further, Attorney Been?

ATTORNEY BEEN: Yes.

REDIRECT EXAMINATION:

BY ATTORNEY BEEN:

Q. Ms. Van Kooy, you indicated that there were prior requests regarding assistance for housing, are you aware whether she followed through with those -- any assistance that was given for housing?

A. When she was on a commitment prior to this one, she worked with a different case manager who did help her -- she was homeless at the time -- helped her apply for different housing, she was turned down by the --

ATTORNEY DRURY: Sorry, can we establish, is this

personal knowledge?

ATTORNEY BEEN: I believe the door has been opened these other records, she just answered questions from the record as to the contact she had and requests she made for housing from a different case manager from the record. I'm simply asking if the record indicates whether she followed up on that request.

ATTORNEY DRURY: It's still hearsay.

THE COURT: I will allow her to answer the question.

THE WITNESS: Subsidized housing was turned down to her, due to a record. So the case manager did assist her with finding a private residence to reside in.

BY ATTORNEY BEEN:

Q. And so the question, did she follow through with moving into that residence?

A. She did move into that residence in February of 2016.

Q. And how long was she in that residence?

A. Approximately five days before she left.

Q. Okay. And are you aware where she went?

A. She got a ride to Waupaca, got on a bus and went back to Illinois.

ATTORNEY BEEN: All right. I have no further questions.

THE COURT: Attorney Drury?

RECROSS-EXAMINATION:

BY ATTORNEY DRURY:

Q. All right, so we're talking about a February 2016 incident, how she got a bus ticket where she got on a bus that took her to Illinois, right?

A. Yes.

Q. She made contact with her mom?

A. Yes.

Q. She established a residence with her mom temporarily?

A. Yes.

Q. She, on her own, got onto the Illinois State Health Insurance?

A. I have no idea.

Q. Because you weren't there, right? It was a different worker?

A. She was in a different state, I have no records of what happens in Illinois.

Q. But she called social services to tell you she had gotten on the health insurance and then she asked for her medication list, didn't she?

A. I don't recall that. I do recall her asking for her medication list, I don't recall what the situation would be with insurance.

Q. Okay. And all of this K[redacted] did in February of 2016?

A. Yes.

Q. You reached out to Evergreen on May 21 of 2018 to request an update on K[redacted]'s status?
A. Yes.
Q. Now that would be first time that you had contact with K[redacted] or anybody at the Evergreen staff since April 25 of 2018; is that right?
A. I feel like I had more contacts with them, but I believe -- I may be referencing probably her notes that I got in between then. The same notes that you were provided.
Q. Okay. So your notes don't indicate that you've had contact during that period of time?
A. Okay.
Q. Is that true?
A. If they're not in here, I guess I didn't, not by phone.

ATTORNEY DRURY: Your Honor, I have no further questions for this witness.

THE COURT: Attorney Been, anything further?

ATTORNEY BEEN: No.

THE COURT: You may step down.

THE WITNESS: Okay.

THE COURT: Attorney Been, you may call your next witness.

ATTORNEY DRURY: County would call Colleen Barribeau.

C O L L E E N B A R R I B E A U,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION:

BY ATTORNEY BEEN:

Q. Ms. Barribeau, can you please state your full name spell your last name for the record.

A. Colleen Barribeau, B-A-R-R-I-B-E-A-U.

Q. And how are you currently employed?

A. I am employed by Evergreen Manor.

Q. All right, and what is your role there?

A. I'm a manager.

Q. And how long have you been so employed?

A. Twelve years in July.

Q. All right. And other than managing the Evergreen Manor, do you have other experience in that area?

A. No.

Q. All right. And do you have any specific training as it relates to managing Evergreen Manor?

A. Just the CBRF training.

Q. All right. And in your role as the director of Evergreen Manor, you're familiar with K[redacted] K[redacted]?

A. Yes.

Q. And how are you familiar with her?

A. She's a resident.

Q. All right. And do you have opportunity -- well, let me

ask you, as the director, how often are you personally at Evergreen Manor?

A. Anywhere between eight and nine hours a day, Monday through Friday, 40, 45 hours a week.

Q. So all of your work hours are essentially spent at Evergreen Manor?

A. No.

Q. Okay.

A. I do appointments and stuff like that.

Q. All right. How many residents do you have a Evergreen Manor?

A. Fourteen right now.

Q. All right. And do you also, given the hours that you spend on a dilly basis at Evergreen, do you have personal contact with the residents?

A. I don't understand.

Q. Are you in contact with residents while you're at Evergreen Manor?

A. Oh, yes.

Q. All right. Do you have a regular opportunity to have contact with K[redacted]?

A. Yes.

Q. All right. And from the time that she came to Evergreen until present, do you believe that she's -- based on your observations -- doing better or worse, or whatever your

observations have been?
A. Worse.
Q. And when you say that, what do you mean?
A. Just over the past six, eight weeks things have declined from when she first came.
Q. Okay. Well, tell us how was it when she first came?
A. She was a little worried, paced, you know, in, you know different -- put out of her home. Now she does a lot more talking to herself over her shoulders, pacing around in and out of the bathroom a lot.
Q. Okay.
A. Accused others of -- I don't know what the right word is -- accused others of harassing her.
Q. Okay.
A. When we didn't really see it.
Q. Okay. And when you say you didn't see it, you didn't see others harassing her?
A. Correct.
Q. Do you have regular opportunity to observe her interactions with other residents?
A. Yes.
Q. Okay. Have you ever observed harassment either way; by a resident to her, or by her to other residents?
A. Not personally, no.
Q. All right. Now, you referenced that recently she's been

talking to herself more?
A. Mm-hmm.
Q. Okay. And you have to answer out loud for the record.
A. Yes.
Q. And can you tell us more about that as far as what you've observed?
A. She talks in like different voices and then talks back to herself. Our office is right above her bedroom, it's loud and we can't hear what she's saying, but she's constantly talking to herself.
Q. All right. Did she talk to herself when she first got there?
A. She had small conversations like in the mirrors and in a whispering kind of voice to where, you know, it wasn't as bad as it is now.
Q. All right. Do -- do the residents at Evergreen Manor, do they have privileges? I mean, can they go out on their own to the store; how does that work at Evergreen Manor?
A. Most of the time we take them to the store. Most of them are under commitment so we transport them.
Q. Okay.
A. And we're in the store with them, not necessarily next to them, but we're in the store with them.
Q. Okay.
A. Or wherever we are, library.

Q. All right. And I guess my question is, are there ever times -- even if you take them someplace -- that they can go off on their own for a short period of time; or how does that work?

A. Yes. She -- or the residents can go off on their own. We have a meeting time and a meeting place when we go somewhere. And K[redacted] has met at, you know, whatever particular time it was.

Q. Okay. And do all of the residents have the same privileges?

A. For the first 30 days they are supposed to stay with staff. We ask that they stay with staff just until we're aware of their personality and, you know, if they're going to possibly elope, or --

But and then reassess the situation at Evergreen. K[redacted] was reassessed and allowed to walk around the store by herself after her first 30 days.

Q. All right. Is that still the situation?

A. We kind of still watch her in -- I mean, we're in the store with her, she can go on her own, but we kind of stay close, because she has these conversations with herself in the store.

Q. Okay.

A. You know, just for her safety, I guess.

Q. All right. And that, just to clarify, that was not the

case for at least a period after the first 30 days when she was doing better; is that correct?
A. Correct.
Q. Other than talking to herself, have you ever noted her to be confrontational in any way?
A. No.
Q. All right.
A. Well, verbally with other residents, yes.
Q. What have you observed?
A. Just them verbally going back and forth about knocking on the bathroom when she's in the bathroom and you know, she gets upset.

ATTORNEY BEEN: All right. I have no further questions.

THE COURT: Attorney Drury?

ATTORNEY DRURY: Thank you.

CROSS-EXAMINATION:

BY ATTORNEY DRURY:
Q. Ms. Barribeau?
A. Yes.
Q. Is there a different title you prefer me to use?
A. That's fine.
Q. Okay. Ms. Barribeau, you have been the director of Evergreen for how long? I missed that.
A. Twelve years in July.

Q. Okay. And it appeared -- and I've got these notes from Evergreen.
A. Yep.
Q. Are you aware with how these notes are kept?
A. Yes.
Q. How are they kept?
A. We keep them on a flash drive and in her personal file.
Q. So it looks like there are three report periods- a.m., p.m., and night watch?
A. Yep.
Q. And whoever is in charge would go in during the assigned shift and enter notes?
A. Yes.
Q. And then they put their initials after the notes; is that right?
A. Yes.
Q. So I mean, I'm looking through here, I see RW, CD, SAB, TE, I see CB; is that you?
A. That's me.
Q. Okay. These notes you have, the important things to put in these notes is first the subject's mood?
A. Mm-hmm.
Q. Is that a yes?
A. Yes.
Q. Sorry. And second, you would document anything that

could be characterized as symptomatic. Like for example, pacing?

A. Mm-hmm, yes.

Q. Like self-talking?

A. Yes.

Q. So you, you know, generally, yourself, make it a practice to make sure that those notes are complete and document how the morning went?

A. Yes.

Q. And have you had occasion to review the notes in K[redacted]'s case?

A. I have.

Q. And have you found them to be accurate?

A. Yes.

Q. All right, your Honor, I'm going to mark this as Exhibit No. 5. Then I'm also going to need back Exhibit No. 1, I believe that your Honor might have. So I think that Exhibit No. 5 are the Evergreen notes regarding K[redacted] K[redacted] from January 19 through April 30. Could you confirm or deny if I'm right on that?

A. I confirm that.

Q. Okay. And then Exhibit No. 1 are the Evergreen notes in May of 2018 from well, I guess the whole month of May, May 1 to May 31?

A. Correct.

Q. Regarding K[redacted] K[redacted]?
A. Correct.
Q. So I have looked at these notes very extensively and I would say based on my read, that K[redacted] since she was placed at Evergreen until about like March 21, somewhere around here, would have days where there were no --
ATTORNEY BEEN: I would object. This sounds like testimony rather than a question.
THE COURT: Well, I'll allow her to finish the question and then make a determination. Is there a question in there?
BY ATTORNEY DRURY:
Q. Sure there is, but I can make it shorter. Based on your observations of K[redacted] and the review of the notes, would you agree or disagree that from the time she was placed at Evergreen until about the middle of March, K[redacted] would have days where she didn't exhibit any symptoms at all?
A. Yes, I agree with that.
Q. And in reading the notes it seems as though you know, the incidences of self-talking, as you put it, might happen like two times a week during this time period, maybe one time a week?
A. Yes.
Q. So that's roughly accurate. I'm just going to kind of mark green here. And then there was a change, according to

your observations, in K[redacted] and her symptoms?
A. Yes.
Q. And that change roughly corresponded with a medication change?
A. Correct.
Q. And then the change and what it is that you observed, was more verbally going back and forth with herself?
A. Yes.
Q. And then more agitation with other residents; is that your testimony?
A. Yes.
Q. Okay. So let me just ask you a couple more specific questions about each of those observations that you made. The verbally going back and forth with herself, would you agree that she made no threats of harming herself during those conversations?
A. I agree.
Q. Would you also agree that when K[redacted] is verbally going back and forth with herself, you didn't hear her making any threats to harm another person?
A. I did.
Q. Okay. And that was documented?
A. Yes.
Q. And do you recall when that was?
A. No. I believe it was after the March -- yeah, it's --

it's -- she's said to -- I don't know exactly what the words were, but she has said to staff or to other residents, verbal altercations.

Q. Okay. So what did she say?

A. I don't recall. Without looking, I don't know the exact words.

Q. Okay. Well, was it a violent threat?

A. Yes.

Q. That would be documented, right?

A. That would be, yes.

Q. Okay, do you want to take your time to review those notes? That's perfectly appropriate.

A. Sure. On 4-3-of 18 a.m. shift.

Q. 4-3 of 18 a.m. shift?

A. Mm-hmm, towards the bottom of the paragraph.

Q. And this was observed by T.E., but you're saying you were there; is that right?

A. Yeah. Tammy and I usually are -- well, let's see -- yes, I was there.

Q. Okay. And what did she say in the a.m. shift that was violent?

A. She, on the bottom says, "But he has not the right to tell me what to do. He called me a bunch of names, and if he does not stop things, I'm going to come to blows and I will beat the shit out of him."

Q. Okay. So this is in regard -- there was an incident the prior day?
A. Yes.
Q. Now [redacted] is a female?
A. Mm-hmm.
Q. Is that a yes?
A. Yes.
Q. You have female and male bathrooms at the house?
A. Not necessarily. We have three bathrooms in the house and the front bathroom after, you know, the initial showers and everybody getting up and, you know, washing their face, brushing their teeth, yes, we clean one -- well, we clean them all throughout the day. We clean the upstairs front bathroom and lock the doors so that us lady staff and [redacted] -- [redacted] has her own key to the bathroom -- can have a clean bathroom.
Q. And the male residents are, I guess, are excluded from the clean area?
A. They are not. Because if the other bathrooms are full, then they come ask and we unlock it for them.
Q. Do the male residents have keys?
A. The female residents?
Q. No, the male.
A. No. I mean, there's a key -- there's a key that sits in the office, they come ask for it.

Q. Okay. But K[redacted] has this key?
A. Yes.
Q. And the male residents do not have this key?
A. Correct.
Q. So the male residents were knocking on the door trying to get into -- or there was a specific male resident the day before knocking and trying to get into the bathroom?
A. This was not into that bathroom.
Q. Okay. And it's not true that that male resident said, "Shut your damn mouth, K[redacted], you're a stupid bitch, you're a dyke."?
A. Yes, he did.
Q. Okay. So there was an altercation that was going back and forth?
A. Yes.
Q. Between two residents; is that right?
A. Correct.
Q. And you're saying on 4-3, during self-talking, K[redacted] responded to that by making a threat that you've read?
A. Yes.
Q. And apart from that incident, do you have any other incidents that come to mind, or is that an isolated incident?
A. I -- at this point, that's an isolated incident.
Q. Okay. When you say that you monitor K[redacted] for her safety, do you mean that you think other members of the

community might get bothered by K[redacted]'s behavior?
A. It's possible.
Q. You're worried -- when you say you monitor it for her safety -- you're worried that other members of the community might react negatively to K[redacted]?
A. They may.
Q. And just to go back to that April 2 incident to April 3 incident that we were talking about before.
A. Mm-hmm.
Q. Well -- strike that. I don't want to ask that. And just to make sure I've established, your testimony today is that K[redacted] is basically worse off now than she was when she initially came to Gateway?
A. Yes.
Q. We heard -- I want to ask you this, are you aware of K[redacted] ever cheeking medicine?
A. I've never supervised it.
Q. Okay.
A. Her cheeking medicine, I've never -- she appears to take it when it's administered.
Q. Okay. So she's never had to be like held down or forcibly administered?
A. No.
Q. In fact, would you agree that sometimes without prompting K[redacted] comes to take her medicines?

A. About 75 percent of the time, yes.

ATTORNEY DRURY: Your Honor, I have no further questions for this witness.

THE COURT: Attorney Been, anything further?

ATTORNEY BEEN: No.

THE COURT: You may step down. And is Ms. Barribeau excluded? Allowed to leave?

ATTORNEY BEEN: Other than the fact that she gave K[redacted] a ride here.

THE COURT: Oh, okay, never mind then. I assume you're giving her a ride back?

THE WITNESS: I think they're coming back to get her, they left me a voicemail.

ATTORNEY BEEN: And I wasn't sure if something had been set up. Heather says --

THE COURT: Any objection to Ms. Barribeau being allowed to leave, or is there a reason for her to stay?

ATTORNEY DRURY: Not from my prospective.

THE COURT: All right, you're dismissed then, ma'am. Do you have any additional witnesses, Attorney Been?

ATTORNEY BEEN: No.

THE COURT: And Attorney Drury, any witnesses you wish to call?

ATTORNEY DRURY: Has the county rested?

THE COURT: Is the --

ATTORNEY BEEN: County rests.

ATTORNEY DRURY: Sorry, I have to wait until the county rests to make my --

THE COURT: Yep.

ATTORNEY DRURY: -- motion to dismiss, which I believe is appropriate at this juncture.

THE COURT: Go ahead.

ATTORNEY DRURY: I don't think that the county has met its burden on two of the three elements by clear, satisfactory, and convincing evidence. For the first criteria, I don't think that it's met, I don't think that the county has shown that K[redacted] is a proper subject for treatment. What we have heard is that K[redacted] has been under a medication order and has consistently taken her medications, although the doctor thinks he read a record about her cheeking medicine, the supervisor at Evergreen was unaware of that ever happening.

We also heard testimony that K[redacted]'s deterioration through the pendency of this commitment has deteriorated. And the claim is that she is engaging in more responses to internal stimuli and more self-talking, and she's in general more agitated. So I think that this shows that the treatment is not working. She's not a proper subject for treatment, and that continuation of the commitment in this case would not meet the clear,

satisfactory, and convincing standard for that prong.

As to the third element, I would argue that, again, the county has not met its burden, based on the testimony offered here that K[redacted] would be a proper subject for recommitment if commitment -- or if treatment were withdrawn in this case. We haven't heard any facts really introduced about the history that K[redacted] has had or the events leading the county to establish dangerousness in the first place.

When explaining why the doctor believes that she would be dangerous if treatment were reviewed, he relied on past facts. So it's really his opinion is the only evidence that the county has introduced in support of that prong. And I think that opinion alone, given no supporting facts, is insufficient to sustain that burden. When the doctor acknowledges that he has not reviewed all of her records, he's only reviewed a portion of those records. We also have evidence here that -- that K[redacted]'s self-talking is not necessarily a dangerous behavior according to the doctor. So for those reasons I'd ask the Court to dismiss at this juncture.

THE COURT: Attorney Been?

ATTORNEY BEEN: Thank you, your Honor. Your Honor, as far as treatability is concerned, I think it was well established that there has been ongoing treatment for

schizophrenia. Whether various treatments are working or not working, I don't think that changes the element as far as her -- her schizophrenia being treatable. I think that was supported by the testimony of both the doctor as well as Heather Van Kooy.

And I know we kind of started this argument when we were doing our motion hearings in regard to the dangerousness element. But your Honor, I don't believe that we need to relitigate the trial that happened in December in front of this Court. The jury made factual findings concerning the initial grounds of commitment. I don't -- I believe the Court could even take judicial recognition of a prior hearing because there's -- I don't think there's anything in the statute that contemplates us redoing what we've done every time we come back to court for a commitment. And the case law even cited by Attorney Drury at our last motion hearing we had, specifically indicated that instead of one of the specific grounds that involve recent acts or the other criteria for dangerousness, that at an extension hearing the Court simply needs to find that there's a substantial likelihood based on the treatment record that the subject individual would be proper subject for commitment if treatment were withdrawn. I think that the testimony of Heather Van Kooy, but primarily of the doctor would clearly meet that criteria and finding that the

Court is required to make.

THE COURT: I will find based upon the testimony that's been presented thus far, that Ms. K[redacted] would be a proper subject for recommitment. The doctor testified that she was suffering from schizophrenia, paranoid type. And I believe based on the testimony that was presented, the Court can find that the county has put sufficient evidence forth to a reasonable certainty by evidence that's clear, satisfactory, and convincing, that not only is she mentally ill, but that she would be a proper subject for treatment.

Apparently she was on a medication regimen that appeared to be working. There hasn't been any evidence presented regarding why her medications were adjusted in March. And it's unfortunate that they were adjusted if the medications she had been on were working and were working to a degree that Dr. Ambas, apparently at some point thought that she may not need a recommitment. But her medication was adjusted and all of the testimony has been that since that time, she has deteriorated and her mental status has declined. And it has declined to a point that Dr. Bales opined that at this time, she would decompensate and become a proper subject for treatment again if treatment were withdrawn.

He further opined that if recommitment wasn't ordered, it was his belief that she would stop taking her

medications. And so I will find that the county has also met the fifth standard essentially of dangerousness. That Ms. K[redacted] would be dangerous to herself and that there is a substantial likelihood, based on her treatment record, that she would be a proper subject for commitment if treatment were withdrawn.

I'm making that determination based on the testimony of Dr. Bales, as well as the observations that were made at Evergreen, and the testimony of Ms. Van Kooy. So I will find that the county has met its burden of proof. I will deny the motion of Attorney Drury at this time.

ATTORNEY DRURY: Then, your Honor, the individual subject would call K[redacted] K[redacted].

THE COURT: All right.

K[redacted] E K[redacted],

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION:

BY ATTORNEY DRURY:

Q. So K[redacted], first you have to state your name and spell it for the record.

A. K[redacted] K[redacted], K-[redacted], K-[redacted].

Q. And do you prefer that I ask questions or do you prefer to make a statement to the judge?

A. Both.

Q. Okay. What would you like to start with?
A. You go ahead and ask me questions.
Q. Okay, sure. So where do you live?
A. I live in the Necedah, Wisconsin right now at a resident home.
Q. Do you want to live there?
A. No.
Q. Where do you want to live?
A. I'd like to go home to Illinois where my family lives. I trade as a dog groomer and a bartender, so I'm perfectly capable of getting a place and paying my bills.
Q. Have you worked in the past?
A. Ten years as a bartender and 25 years as a dog groomer. I was an entrepreneur, I had my own grooming shop up on Main Street in Iola, Wisconsin.
Q. Have you graduated from high school?
A. I graduated from high school in 89. I was placed 16th and my high school placed fifth in nation.
Q. And you say that you placed 16th, does that mean your class rank was 16?
A. Yes, out of 278 people.
Q. Did you do any schooling in addition to your high school?
A. I went to college for a semester, but I decided to go ahead and become a capitalist and I opened my own grooming

shop.
Q. Okay. You mentioned that you have family in Illinois, can you be a little bit more specific about who your family is?
A. I have a daughter, a mom, and two sisters and their families.
Q. Okay. Have you lived in Illinois in the past?
A. I grew up in Illinois.
Q. And why would you rather live there than here?
A. I want to be close to my family.
Q. Okay.
A. My daughter still needs a mom.
Q. Okay. There's a lot of testimony that we've heard today about doctors believing that you wouldn't take your medication. Do you agree or disagree with those doctors?
A. Well, actually, when I went down to Illinois, I went to the county and I got interviewed by them and they believed that I was not -- what's the words -- they didn't feel as though I needed medication and that was DuPage County in Illinois.
Q. Mm-hmm.
A. And I went to -- I went to them about six or seven times when I left Wisconsin. So but -- if the injectables, which I think do affect me in a good way. The other drug, your Honor, was making me wobble like this and shuffle my feet.

It was physically affecting me, and that's why the doctor took it off of my chart to take.

But I would stay on it, the injectables, once a month. And that's not really interfering much with your life, you know, with work and home and kids.

Q. Okay. How would, you know, you go about finding a place to live? I know it's a basic question, but I'm just -- that's one of the criteria the Court has to determine.

A. I have friends down in Illinois that I could stay with until a got a job and enough money to get my own place.

Q. Okay. Do you -- have you had problems with some of the residents at Evergreen?

A. Well, it's 14 men. And I was intermingling with them and some of them started to like me, but then they violated my personal space by coming and knocking on the bathroom door every time I was in there. And I just decided to start keeping to myself more often to avoid confrontation.

Colleen told me, too, she said, why don't you just stay in your room or come upstairs. So I don't go in the area with the -- the area that the man that I got into an argument with -- he's got a basement TV and couch, and I just stay out of that area.

Q. And this is a silly question, but it's, again, one the judge needs an answer to. Are you going to -- do you think that you would become dangerous or a proper subject for

recommitment if the commitment was not extended in your case?
A. No, Ms. Drury. I have no record of violence on any of -- any state that I've lived in. So I -- I'm not a danger to myself, I'm not a danger to others.
Q. Is there anything else that you'd like to talk to the judge about?
A. I wrote some notes, if you don't mind if I look through them?

What happened was I came up to Wisconsin to do some paperwork, the paperwork that I was doing was getting my ID and stuff. I lost everything and I had a friend at DMV that helped me get an ID. And so I was here and I stayed at the warming shelter because I'm not very -- I didn't have very much money on me. And I was -- it was Thanksgiving and I got stranded here because my mom didn't send some of my money so I could get home in time. So I was in a church because the door was open and I was studying religion and the police came and with were drawing guns. And I wasn't doing anything wrong, I wasn't breaking and entering, I wasn't stealing.

I can't really think of anything more that I want so say, except I'm a good mom, I was a Girl Scout leader and I -- she was in soccer, my kid went to school in Iola when I did live up here. She placed second and fifth in state with her education. And she -- I took her to soccer and we grocery shopped together, and I cook, I clean, I have my own

trades. And I think I'm perfectly capable of taking care of myself.

Q. Thank you for telling your story today.

A. Mm-hmm.

ATTORNEY DRURY: Your Honor, I have no further questions for this witness.

THE COURT: All right. Attorney Been, do you have any questions for Ms. K[redacted]?

CROSS-EXAMINATION:

BY ATTORNEY BEEN:

Q. K[redacted], you heard the testimony earlier that in -- I believe it was around February of 16 -- the department had assisted you in finding an apartment in Iola; is that correct?

A. Yes.

Q. And is it also true that you were there for a matter of days and then you left for Illinois?

A. Yes, it is true, sir. What happened was that I got up there and I really missed my family, so I decided to go home. And we called my case worker and told her, and she released me from commitment. I did follow-up with the county doctor where my family lives. And I left because I just really don't like being alone and I like to be -- I'm a family-oriented person.

Q. I'm sorry, are you done?

A. Yes, sir.
Q. I just wanted to make sure -- I didn't want to cut you off. And so the department, you didn't tell them you were leaving, you went to Illinois and then you called them, correct?
A. Yes.
Q. All right. And the department dismissed the commitment, correct?
A. Yes.
Q. And then you ended up back in Waupaca in late 2017, correct?
A. Yes.
Q. And I know you just said something about you came to Waupaca to get papers; can you explain why you came back to Waupaca?
A. I had lost everything but birth certificate, and so you need a state ID to get your Social Security Card and you need your ID to get a Social Security Card. So I was in a catch-22 situation and I knew that if I came up here, I would be able to get my identity papers, everything that I needed.
Q. Weren't --
A. It's just -- what's that, sir?
Q. Weren't you a resident of Illinois at that point because you were living with your mom?
A. I couldn't get any of my -- I couldn't get my ID, I had

lost everything but my birth certificate. You need a birth certificate and a Social Security Card to get your IDs so I needed to come up here goat my ID. My plans were just to go back to Illinois and finish collecting my paperwork. I got robbed so I needed to re-establish.

Q. And when did you come back to Waupaca?

A. In November, sir.

Q. Isn't it true that you had some police contacts in July of 2017, as well?

A. Yes. The police were very kind to me. They helped me buy a bus ticket back to my home.

Q. All right. And why did you come to Waupaca that time?

A. Well, it was just summer and I missed living up here. I lived up here for six and a half years in Northland and I liked having my shop on Main Street and I came back to visit some people that I know in Iola.

Q. Okay. And I'm just trying to remember the timeframe, isn't it true you also had some police contacts in February of 2017 as well, you were still here in Waupaca?

A. I don't recall that, sir.

ATTORNEY BEEN: Okay. No further questions.

THE COURT: Anything further Attorney Drury?

REDIRECT EXAMINATION:

BY ATTORNEY DRURY:

Q. Just one. K[redacted], do you think you do better closer to

your family or far away from your family?
A. Closer.
ATTORNEY DRURY: No other questions, your Honor.
THE COURT: Ms. K[redacted], you said there was one medication that made you wobble.
THE WITNESS: Yes.
THE COURT: Do you recall what medication that was?
THE WITNESS: No, I'm not very good at remembering the names of my medications. But it was something that Dr. Ambas took me off of right away, where he decreased it and got me off of it. And I have no idea why anyone would want me to go back on such a horrible thing.
THE COURT: So the medication change that took place in March, was that to take you off of that medication that made you wobble?
THE WITNESS: Yes.
ATTORNEY DRURY: It's not. I can ask questions on that.
THE COURT: Okay, I just have a couple questions for her. Then in November when you came back to Waupaca, you said it was to get paperwork, is there a reason you couldn't get an identification card in Illinois?
THE WITNESS: In Illinois you need your Social Security, your resident mailing address, and you need your

birth certificate. I only had my birth certificate.

THE COURT: But I assume you could have gotten a Social Security Card in Illinois?

THE WITNESS: Well, I figured since I was up here that I would -- that I would try and get my Social Security card, too. So I asked Heather if she could help me find a ride to the Social Security Office and she said there was no program like that available. And I know that the county had a program in the past, so I was not able to get my Social Security and I went there with my paper ID, I took a bus. And they said that I needed my state ID. So I was on my way back to Appleton once I got my state ID.

THE COURT: Okay. I don't have anything further, do you want to follow-up with those questions?

BY ATTORNEY DRURY:

Q. Very sorry, your Honor. But K[redacted], do you remember when you were first in the commitment, were you getting shots or were you not getting shots?

A. I was taking oral medicine.

Q. Yep. And then in March of 2018, you started taking shots, right?

A. Right.

Q. Your Honor, I have -- do you know what that medication is?

A. INVEGA.

Q. So when you started taking the INVEGA, that happened in March of 2018?

A. Yes. I believe that's when I started.

ATTORNEY DRURY: Okay. I have no further questions, your Honor.

THE COURT: All right. Attorney Been, do you have anything further?

ATTORNEY BEEN: No.

THE COURT: All right, you may step down, ma'am.

THE WITNESS: Thank you, your Honor.

THE COURT: Do you have any additional witnesses, Attorney Drury?

ATTORNEY DRURY: No, your Honor, the individual subject rests.

THE COURT: Any rebuttal testimony, Attorney Been?

ATTORNEY BEEN: No.

THE COURT: Do you wish to make a statement?

ATTORNEY BEEN: Your Honor, I would be the first to -- or I should say the county would be the first to admit that there are some of these cases that are closer to the line than others. This was a fifth standard commitment in the first place. As I already argued, I don't believe we need to reestablish what a jury established back in December, as far as the initial grounds for commitment. Because today the Court's required finding is that she's

likely to become a subject for commitment if treatment is withdrawn.

Part of the concern here and I think consideration the Court can make is we've heard a lot of argument about -- or she's testified she does better with family, she wants to go back to Illinois. The department has worked with her on that. The last time wasn't exactly worked with her, she went back to Illinois. The department dismissed the commitment, hoping that that would work out for her, and she ended up back in Waupaca, nonetheless.

And that is really the concern here is that this is an endless cycle for her, as far as going back and forth. I mean, she certainly has the right to travel, but this is not a situation, based on the history, where there is a belief that she is going to go to Illinois and everything is going to work out and the cycle won't continue.

So your Honor, I believe the record would support at this point that she would meet all three criteria. That she certainly is mentally ill, we believe that treatability is also obvious from the testimony, we also believe that she would likely become a candidate for commitment if treatment is withdrawn. So we would ask the Court to grant the extension.

THE COURT: Attorney Drury?

ATTORNEY DRURY: Thank you, your Honor. We oppose

any further deprivation of K[redacted]'s liberty in this case. K[redacted] has asked the Court to go home to Illinois. And we ask the Court to find that the county has not met its burden of proof in this case. And I need to just, at the offset, address a comment made by the county regarding what the standard to recommit is. I just want to make the record clear, the Court has already ruled on that, I disagree with the county's interpretation of that definition. The law cited in my previous motion and also *O'Connor v. Donaldson* 422 U.S. 563, does indicate that there has to be something more than just those facts that supported the initial commitment. Because in order for someone to be committed, they have to be both dangerous and mentally ill. I'm not going to present argument in that but my purpose in making these comments, is to make it clear that I'm not waiving that argument that the county has raised on its closing.

So just from a factual prospective, I want to concentrate on the two elements that I think that the county has not met. The first element I think the county has not met is whether she is treatable. And I think quite honestly, your Honor, that this demonstrative exhibit -- which I didn't have marked, but perhaps should have -- really indicates that K[redacted] had a period of time where she was receiving treatment, and her symptomology was, you know contained. She was doing well. Her medication was changed,

she did poorly.

She's under a commitment, she doesn't get to have a choice on what medication she takes and what medication she doesn't take. She has done everything the county has asked her to do exactly. And even though she has done everything that the county has asked her to do exactly, the county has made a choice to administer a medication that doesn't control her symptoms. And if the medication doesn't control her symptoms, I do think that that affects whether she is a proper subject for treatment.

Proper subject for treatment is defined under the law as follows: If in determining if a mentally ill person is treatable, the Court must consider whether the administration of or any combination of treatment techniques may control, improve, or cure the substantial disordering of a person's thought, mood, perpetration, orientation, or memory. So that is the standard here. And we have six months of the county being able to administer whatever medications and whatever treatment the county deems is appropriate to control K[redacted]'s treatment.

And yet, what we have heard is this evidence that indicates that K[redacted] is more agitated, and that he she has been doing more self-talking. Now, as I'm going to emphasize in a little bit, that doesn't mean that she's dangerous, all right. That is evidence that the

symptomology that is attributed to her alleged mental illness is not treatable. And if it were treatable, the county should have, in the course of this six month period, been able to prove a substantial improvement. So the evidence on that point is not clear and it's not satisfactory and it's not convincing, because during the course of her commitment, we have K[redacted] showing very little signs of side effects. And then we have, you know, half of the commitment where the side effects are uncontrolled.

The doctor's opinion here saying that she -- her condition is treatable, I would note is only based on review of her medical history, but then review of the day-to-day accounting of her behavior in May of 2018. So the doctor's opinion, your Honor, is only good as the facts supporting that opinion. And the doctor by only consulting the facts in May of 2018, formed his opinion on whether she's a treatable subject, based on an incomplete presentation of the facts in this case. So I don't think that the opinion, which is quite honestly the only testimony -- well, it's a major bit of testimony the county has offered in support of the element -- I don't think that his opinion passes muster here. For the reasons that I have outlined, I don't think that the county has made a clear and satisfactory and convincing case that K[redacted] is a proper subject for treatment.

So I'm going to focus the remainder of my comments on the fact that K[redacted] is just not someone who meets the dangerousness standard or the recommitment standard in this case. There is a case that your Honor should be aware of, and it's *Waukesha County v. M.M.*, and I can provide the citation to the Court, probably after the conclusion of my argument. But basically that case stands for the proposition that self-talking in and of itself -- although it might be concerning to other members of the community -- is not something that meets the dangerousness standard in a mental commitment setting.

Really what is needed would be some evidence that there were threats of suicide, that there were threats of harm to others, that there were attempts at harm to others. Or some other component of dangerousness behavior. But I don't think that the self-talking here is linked to that. What we heard is there was an isolated incident where K[redacted] said something like she was going to beat another resident up.

MS K[redacted]: He threatened to shove me on the ground. And I went to Colleen right away and I told her, I said, I don't want to get into a fight with a man, because if somebody physically assaults you, you have a right to defend yourself. So I reported him right away.

ATTORNEY DRURY: But my comment with that, your

Honor, is that type of behavior is not necessarily arising out of an untreated mental illness. That type of behavior happens for people who don't have mental illness who get in confrontations with other people. K[redacted] is in a setting where she's living very closely with these other individual male residents, there was a disagreement over the bathroom.

Quite honestly, your Honor, I was talking about this with appellate counsel, and appellate counsel noted to me that she got in numerous fights over the bathroom with her brothers and sisters as she was growing up; as did I; as did, I'm sure, your Honor. So I don't think that that one isolated incident or throwaway conduct is, A, necessarily symptomatic of mental illness; B, quite honestly I'm not sure if it posed a reasonable or credible threat of harm.

So again, what we have here to support the evidence that a commitment extension would be appropriate in this case is a doctor's opinion. But again, I have the same problems with that opinion, in that it's not sufficiently supported by admissible facts.

K[redacted] testified that she would take the medication, the INVEGA shot, because she doesn't think that there is any harm in that shot. If she were off of the commitment, I think that that evidence also goes directly against the conclusion, that she would not be compliant with a medication regimen if she were released from the

commitment.

K[redacted] is somebody that wants to go home, she doesn't want to reside in Juneau County in a residence where she does not feel safe. She wants to be able to return to Illinois where her family is, and she asks the Court to issue a decision that allows her to do that.

THE COURT: And Attorney Drury, the Waukesha county case that you made reference to, is that a commitment or a recommitment?

ATTORNEY DRURY: It was a commitment.

THE COURT: All right. Attorney Been?

ATTORNEY BEEN: Your Honor, I guess just a few reactions to the argument. Frankly, I don't see how whether behavior improved or didn't improve affects whether the condition is treatable. For the sake of argument, let's say that the whole issue of Dr. Ambas' medication that he did something completely wrong -- for the sake of argument -- doesn't meaning that's not treatable. That means maybe this medication isn't working, that's no shocker in dealing with mental health, and there needs to be time for adjustment and to see if medications are working. Maybe it's something that next month they'll decide no, this really has been a bad trend downwards, we'll change them up again.

In any event, I think that all shows -- actually proves the treatability because we've seen a positive

reaction to medications, and although they tried to switch it up and deal with side effects, things are getting slightly worse. If anything, it's showing that medication is appropriate treatment.

The argument that the doctor only relied on May case notes, I don't think is representative of the testimony. He indicated that the paper documents he had, specifically as it pertained to Evergreen, was May of 2018. But then he went and talked to staff, and so he had a broader base of information to ask if there were other incidents or anything, you know, prior history inconsistent with what he had observed. So not to get into what was or not accurate of what he relied on, but certainly to say that he only relied on the May of 18, I don't think is accurate. He also had notes from other providers as well to form his opinion. And I think it's reasonable to assume if he felt like he didn't have enough, or wanted additional information, he certainly could have asked for it if he felt it was necessary.

I will concede that the testimony regarding self-talking, the testimony regarding the bathroom incident, all of that, none of that was presented as to say that that would be the basis of a new commitment, as far as the criteria of dangerousness. And it just goes back to the original argument, that I believe that the case law -- even

the case law previously cited by Attorney Drury -- supports the fact that in place of an ongoing -- a recent incident or act or omission demonstrating dangerousness, that in the recommitment phase, it is the criteria saying she's -- there's a substantial likelihood she will become a candidate for commitment if treatment is withdrawn. And without making that whole argument again, I would ask the Court to grant this request for extension.

THE COURT: I am going to find that the county has met its burden of proof to a reasonable certainty by evidence that is clear, satisfactory and convincing. Ms. K[redacted], I hope that you can return back to Illinois soon to your family. I believe you want to be back in Illinois, I believe your testimony about being a good mom and wanting to return to your family and to your daughter. And I wish that Dr. Ambas had been here to testify, because I questioned why he made the medication change, that whatever medication changes he made, why he felt the need to make them in March of this year. It sounds like you were doing really well and maybe there wouldn't have been a need for recommitment if you had stayed on the medication regimen that you were on at the time that you initially went to Evergreen.

But there was some medication change, and it appears from all of the testimony that at that point, there was some change in your mental status, and that there was

some decline and deterioration that took place after that medication change.

I don't think anyone has made the argument that Ms. K[redacted] is not mentally ill. She has a diagnosis of schizophrenia, paranoid type. So the question is whether or not she's a proper subject for treatment, and whether or not the dangerous standard has been met.

I agree with Attorney Been, that the fact that there was some deterioration after this change in your medication, to me proves that you are treatable. That whatever the medication regimen you were on prior to March of this year seemed to be working. It sounds like you were being treated, that the medication was treating you, and that you are a proper subject for treatment and were getting better.

So I believe the county has met its burden of proof on the element of whether or not you're a proper subject for treatment. The doctor also opined that you were a proper subject for treatment.

In looking at the dangerous standard in a recommitment proceeding, again, I agree with Attorney Been that the county doesn't have to show any recent acts of dangerousness. I don't -- I agree with Attorney Drury that you're self-talking, your pacing, those types of things don't show that you're dangerous.

But the question is whether or not at this point, if treatment was withdrawn, if you would then become a proper subject for a new commitment. And I believe that the county has met its burdens in showing that if treatment were withdrawn, that you would be a proper subject for a commitment.

I'm hopeful that if this commitment is extended, that maybe they can look at your medication again and get you to a point where this commitment can end. But at this point, I think you are a proper subject for recommitment.

Is there anything further?

ATTORNEY DRURY: Not from the individual subject's prospective.

THE COURT: Okay. Anything further, Attorney Been?

ATTORNEY BEEN: Oh -- the Court --

THE COURT: It will be for a period of six months.

ATTORNEY BEEN: And is the Court addressing the med order as well? We are requesting --

THE COURT: Yes, at this point I will enter an order for involuntary medication to be administered.

ATTORNEY BEEN: And I'm sorry, the extension is for normally for 12 months.

THE COURT: Oh, it is for 12 months, normally.

ATTORNEY BEEN: The initial period of commitment

is six months and then extension thereafter is 12 months.

ATTORNEY DRURY: I think the Court has discretion to fashion whatever remedy the Court feels would be appropriate, and we'd ask for a commitment re-extension of six months in this case. The basis again, is because it appears as though it took three months to get her stable and three months to destabilize her, so hopefully allowing the county, you know, six months to sort it out, should be sufficient.

And I guess I should say that I'm not conceding that she was destabilized, that's according to the county's viewpoint.

THE COURT: Certainly. But I am going to order that it be for a period of 12 months, with the understanding that it doesn't have to be for a period of 12 months. If things get better, the commitment can always end before that time. And it will be on an outpatient basis with conditions. As far as the exhibits that were previously offered and received, I think exhibit --

ATTORNEY DRURY: There should be very few that were moved, it would just be the social worker's notes and the doctor's reports. And the others were just marked for the record. That was a strategic decision by counsel.

THE COURT: And I have that Exhibit 3 was received, which was the doctor's report. Exhibit 4 was

received, which was Ms. Van Kooy's report.

ATTORNEY DRURY: The rest of them should not be received.

THE COURT: All right, those are the only two that I see.

ATTORNEY DRURY: Yes, your Honor, again, that was not a mistake, that was strategic consideration. I want them there for the record, but I don't want them as evidence. And, your Honor, I'm not sure what you'd like to do with this demonstrative exhibit, but I can throw it in the trash, unless your Honor feels differently.

THE COURT: It wasn't received so you can do whatever you wish with it.

ATTORNEY DRURY: That sounds good.

THE COURT: Is there anything further?

ATTORNEY BEEN: No, thank you.

ATTORNEY DRURY: Not from the individual subject.

THE COURT: Thank you.

[PROCEEDINGS CONCLUDED]

STATE OF WISCONSIN)
)ss
COUNTY OF WAUPACA)

I, Dana Amundson, Official Court Reporter for the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 5th day of July of 2018.

Electronically Signed by:

Dana Amundson, RMR, CRR

West's Wisconsin Statutes Annotated
Social Services (Ch. 46 to 58)
Chapter 51. State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act (Refs & Annos)

W.S.A. 51.20

51.20. Involuntary commitment for treatment

Effective: March 9, 2018

Currentness

(1) Petition for examination. (a) Except as provided in pars. (ab), (am), and (ar), every written petition for examination shall allege that all of the following apply to the subject individual to be examined:

1. The individual is mentally ill or, except as provided under subd. 2. e., drug dependent or developmentally disabled and is a proper subject for treatment.

2. The individual is dangerous because he or she does any of the following:

a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.

b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm. In this subd. 2.b., if the petition is filed under a court order under s. 938.30(5)(c)1. or (d)1., a finding by the court exercising jurisdiction under chs. 48 and 938 that the juvenile committed the act or acts alleged in the petition under s. 938.12 or 938.13(12) may be used to prove that the juvenile exhibited recent homicidal or other violent behavior or committed a recent overt act, attempt or threat to do serious physical harm.

c. Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals. The probability of physical impairment or injury is not substantial under this subd. 2. c. if reasonable provision for the subject individual's protection is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services, if the individual may be provided protective placement or protective services under ch. 55, or, in the case of a minor, if the individual is appropriate for services or placement under s. 48.13(4) or (11) or 938.13(4). The subject individual's status as a minor does not automatically establish a substantial probability of physical impairment or injury under this subd. 2. c. Food, shelter or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by a person other than a treatment facility, does not constitute reasonable provision for the subject individual's protection available in the community under this subd. 2. c.

d. Evidences behavior manifested by recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. No substantial probability of harm under this subd. 2. d. exists if reasonable provision for the individual's treatment and protection is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services, if the individual may be provided protective placement or protective services under ch. 55, or, in the case of a minor, if the individual is appropriate for services or placement under s. 48.13(4) or (11) or 938.13(4). The individual's status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious disease under this

subd. 2. d. Food, shelter or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by any person other than a treatment facility, does not constitute reasonable provision for the individual's treatment or protection available in the community under this subd. 2. d.

e. For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. The probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2. e. if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services or if the individual may be provided protective placement or protective services under ch. 55. Food, shelter, or other care that is provided to an individual who is substantially incapable of obtaining food, shelter, or other care for himself or herself by any person other than a treatment facility does not constitute reasonable provision for the individual's care or treatment in the community under this subd. 2. e. The individual's status as a minor does not automatically establish a substantial probability of suffering severe mental, emotional, or physical harm under this subd. 2. e.

(ab) If the individual is an inmate of a prison, jail or other criminal detention facility, the fact that the individual receives food, shelter and other care in that facility may not limit the applicability of par. (a) to the individual. The food, shelter and other care does not constitute reasonable provision for the individual's protection available in the community.

(ad)1. If a petition under par. (a) is based on par. (a)2.e., the petition shall be reviewed and approved by the attorney general or by his or her designee prior to the time that it is filed. If the attorney general or his or her designee disapproves or fails to act with respect to the petition, the petition may not be filed.

2. Subdivision 1. does not apply if the attorney general makes a finding that a court of competent jurisdiction in this state, in a case in which the constitutionality of par. (a)2.e. has been challenged, has upheld the constitutionality of par. (a)2.e.

(am) If the individual has been the subject of inpatient treatment for mental illness, developmental disability, or drug dependency immediately prior to commencement of the proceedings as a result of a voluntary admission, a commitment or protective placement ordered by a court under this section or s. 55.06, 2003 stats., s. 971.17, or ch. 975, or a protective placement or protective services ordered under s. 55.12, or if the individual has been the subject of outpatient treatment for mental illness, developmental disability, or drug dependency immediately prior to commencement of the proceedings as a result of a commitment ordered by a court under this section, s. 971.17, or ch. 975, the requirements of a recent overt act, attempt or threat to act under par. (a)2. a. or b., pattern of recent acts or omissions under par. (a)2. c. or e., or recent behavior under par. (a)2. d. may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn. If the individual has been admitted voluntarily to an inpatient treatment facility for not more than 30 days prior to the commencement of the proceedings and remains under voluntary admission at the time of commencement, the requirements of a specific recent overt act, attempt or threat to act, or pattern of recent acts or omissions may be satisfied by a showing of an act, attempt or threat to act, or pattern of acts or omissions which took place immediately previous to the voluntary admission. If the individual is committed under s. 971.14(2) or (5) at the time proceedings are commenced, or has been discharged from the commitment immediately prior to the commencement of proceedings, acts, attempts, threats, omissions, or behavior of the subject individual during or subsequent to the time of the offense shall be deemed recent for purposes of par. (a)2.

