

DANGEROUSNESS AT RECOMMITMENT

THE GOVERNMENT'S BURDEN TO PROVE
YOUR CLIENT IS ACTUALLY DANGEROUS

JEREMY NEWMAN
&
ERIC HEYWOOD

LEARNING OBJECTIVES

- To understand that untreated mental illness does not equal DANGEROUS
 - To identify when the government hasn't or can't meet their burden to prove "current" dangerousness
 - To apply the standard to win at recommit hearings
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PUTTING THE ISSUE IN CONTEXT

- Chapter 51 *involuntary* civil commitments for mental health treatment
 - Government's burden to prove by clear and convincing evidence that subject is mentally ill, treatable, and DANGEROUS.
 - Original commitments may be 6 months
 - Recommitments may be 12 months (year after year after year)
 - Our focus is on RECOMMITMENTS
 - More specifically, one of the three elements: DANGEROUSNESS
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WIS. STAT. § 51.20(1)(A)2.

- **DANGEROUSNESS FOR ORIGINAL COMMITMENT:**
 - WIS. STAT. § 51.20(1)(a)2.a.-e. The 5 standards of dangerousness, all require “substantial probability” of type of harm specified as evidenced by “recent” acts, omissions, pattern of behavior
 - (1) Physical harm to self
 - (2) Physical harm to others
 - (3) Physical harm to self or others based on impaired judgment
 - (4) Physical harm to self based on inability to meet basic needs (nourishment, medical care, shelter, safety)
 - (5) “Fifth Standard,” Self harm due to incompetence and based on treatment history and pattern of recent acts
- **KEY TAKEAWAY:** 5 standards all require RECENT behavior demonstrating substantial probability of harm to self or others

WIS. STAT. § 51.20(1)(AM):

- **IF THE CLIENT IS CURRENTLY UNDER A COMMITMENT ORDER:**

- “the requirements of a RECENT overt act, attempt or threat to act under [the 1st or 2nd standards], pattern of *recent* acts or omissions under [3rd and 5th standards], or *recent* behavior under [4th standard] ...MAY BE SATISFIED BY A SHOWING THAT THERE IS A SUBSTANTIAL LIKELIHOOD, BASED ON THE INDIVIDUAL’S TREATMENT RECORD, THAT THE INDIVIDUAL WOULD BE A PROPER SUBJECT FOR COMMITMENT IF TREATMENT IS WITHDRAWN.”
- Dangerousness at recommitment = **proper subject for commitment** if treatment withdrawn
- If proceeding under 51.20(1)(am), petitioner need not prove “recent” acts

“PROPER SUBJECT FOR COMMITMENT”

- **STATE V. W.R.B., 140 WIS. 2d 347, 411 N.W.2d 142 (Ct. App. 1987)**
 - 51.20(1)(am) is about ending the “revolving door” which was described as “vicious circle of treatment, release, overt act, recommitment.”
 - *Sheboygan County v. Cheryl L.M.* (unpublished 2001 COA case): “proper subject for commitment” = mentally ill, treatable, but resistant to treatment such that recommitment would occur
- **PORTAGE COUNTY V. J.W.K., 2019 WI 54**
 - SCOW decision mostly dealing with mootness issue, BUT
 - SCOW says that original and recommitments require government to prove mental illness, treatability, and **DANGEROUSNESS** by clear and convincing evidence.
 - Most importantly for us, SCOW explained that 51.20(1)(am) is merely an “alternative evidentiary path” to prove dangerousness when a person’s behavior may have changed under commitment, because if the treatment were withdrawn “such behavior would recur”

LANGLADE COUNTY V. D.J.W.

- **2020 WI 41: read the case**
- **SCOW reversed DJW's commitment based on insufficient evidence of dangerousness**
- **Expansion of *J.W.K.*'s "such behavior would recur" language**
- **51.20(1)(am) requires clear and convincing evidence of DANGEROUSNESS.**
- **Government must link alleged dangerousness back to one of the 5 standards of dangerousness under 51.20(1)(am)2.a.-e.**
- **Only difference at recommitment is that government need not prove "recent" conduct**
- **Evidence of subject's mental illness, treatability, refusal to comply with treatment, or denial of mental illness is not sufficient (neither is loss of employment, living with your parents, or receipt of government financial assistance).**

DJW TAKEAWAYS

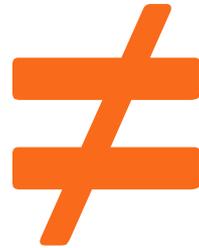
- 1. At recommitment, County must prove, by clear and convincing evidence that your client is Dangerousness, either with evidence of recent acts under 51.20(1)(a)2.a.-e. by proving that if treatment were withdrawn, they would be/are DANGEROUS under one of those 5 standards**
- 2. “Going forward”...circuit courts are required to make specific factual findings about which standard of dangerous the recommitment is based**
- 3. DANGEROUSNESS is ultimately a LEGAL QUESTION, for circuit court to independently decide based on evidence/factual findings, review de novo**
- 4. Allegations not admitted into evidence at the final hearing are not “evidence” upon which a commitment may be based (i.e. doctor’s reports, detention reports, etc.)**

POST DJW GOOD AND BAD

- **GOOD** 😊
 - *Winnebago County v. L.F.-G.*, 2019AP2010 (unpublished, but authored slip op.)
 - *Portage County v. E.R.R.*, 2020AP870-FT (unpublished, but authored slip op.)
- **BAD** ☹️
 - *Winnebago County v. S.H.*, 2020 WI App 46
 - Doctor's testimony that S.H. engaged in "dangerous behavior" when not on medication was sufficient to uphold recommitment
 - *Portage County v. L.E.*, 20AP1239-FT (unpublished, but authored slip op.)
 - Doctor's testimony that L.E. flooded house and wouldn't survive without her medications was sufficient
- **WATCH FOR** *Waupaca County v. K.E.K.*, 2018AP1887 (SCOW to decide if (1)(am) is constitutional), oral argument scheduled for November 17, 2020).

RECOMMITMENT

Mentally Illness



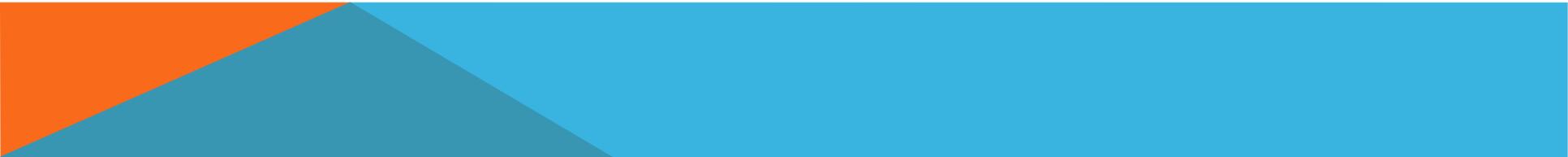
Dangerousness

RECOMMITMENT

Mentally Illness

AND

Dangerousness



Social Worker



Status quo

Doctor



Always right

Corp. Counsel



Cover their back

The Players

**Better safe
than sorry.**

**Just trying
to help.**

Working so far.

What's the harm?

Bad Theories

Effect of Bad Theories

- **Never-ending extensions**
- **WI highest commitment rate**
 - over 4x national average (2015)
- **Appellate courts make good case law!**

DANGER

Theory?

Feeling Tense?

Were they dangerousness?

Not past tense!



Danger

Present Tense



Welcome
to the
present!

“Is or would be
dangerous?”

Danger

Liberty Interest

- **Liberty means own choice, even if not best choice**
- **Benefit of own decisions for mental illness**
- **We are not GAL**
- **Government only involved if danger**



Extension Checklist

Ch. 51 Extension Checklist

Client: _____ Hearing Branch/Date/Time: _____
 Client phone: _____ Client location: _____

- Talk to client:
 - How is treatment going?
 - What aspects of treatment do you like/dislike?
 - Do you think you need continued treatment?
 - How does the commitment order affect your life?
- Proper notice and other due process issues? Wis. Stat. §§ 51.20(5), (10)
 - Actual notice (not constructive)
 - Receive info on time (witness lists, reports)
 - Due process and fair treatment, *Lessard*, 349 F. Supp. 1078
 - Right to counsel
 - Move to dismiss if appropriate
- One of examiners chosen by client? § 51.20(9)(a)2.
 - Get letter with Dr. name, willing to do eval at county rate and testify; timeframe needed to complete report
- Independent doctor at client's expense (or County's, if indigent)? § 51.20(9)(a)3.
- Jury trial? § 51.20(11)
 - Note timing of request and how it impacts final hearing
 - Must request in writing at least 48 hours before final hearing. § 51.20(11)(a)
 - Latest to request = _____
- What is the petitioner seeking in an extension order? § 51.20(11)
 - Extension? § 51.20(1)(am)
 - Mentally ill
 - Treatable
 - Currently dangerous ("is or would be dangerous" *D.J.W.*, 2020 WI 41)
 - Length? Up to 1 year. § 51.20(13)(g)1.
 - Inpatient or outpatient?
 - Medication order?
 - Settlement agreement? § 51.20(8)(bg)
- Get treatment records; do not need release. § 51.30(4)(b)11.
- Reports to counsel 48 hours before hearing? Deadline = _____. § 51.20(10)(b)
- Witnesses/evidence: notify within reasonable time before hearing = _____. § 51.20(10)(a)

- County's potential witnesses:
 - Object to hearsay (fact witness, not just doctor)

Name	Number	Observations

- Witnesses client may wish to call:

Name	Number	Observations

- Hearing:
 - Open or closed? §§ 51.20(5)(a), (12)
 - Make request in writing in advance
 - Right to remain silent. § 51.20(5)
 - Personal appearance? §§ 51.20(5)(b); 885.60
 - Object for client's right to be present
- Hearing strategy:
 - Not currently dangerous
 - Not substantially dangerous
 - More than would benefit from or needs assistance
 - What conduct is or would be dangerous?
 - If taking meds for the most part now, not substantially likely to go off of meds
 - If went off meds but not dangerous, not subs. likely to commit a new dangerous act
- Disposition
 - Least restrictive placement? § 51.20(c)(3)
 - Length of commitment? § 51.20(13)(g)
 - Involuntary medication order? *Virgil D.*, 189 Wis. 2d at 14 (1994)
 - Advantages, disadvantages, and alternatives explained?
 - Client incapable of expressing and applying understanding of Adv/Dis/Alt?
 - Even if grounds for commitment, argue to protect client's liberty
- Appeal?
 - File notice of intent to pursue postdisposition relief within 20 days. § 809.30(2)(b)

Defense Strategy

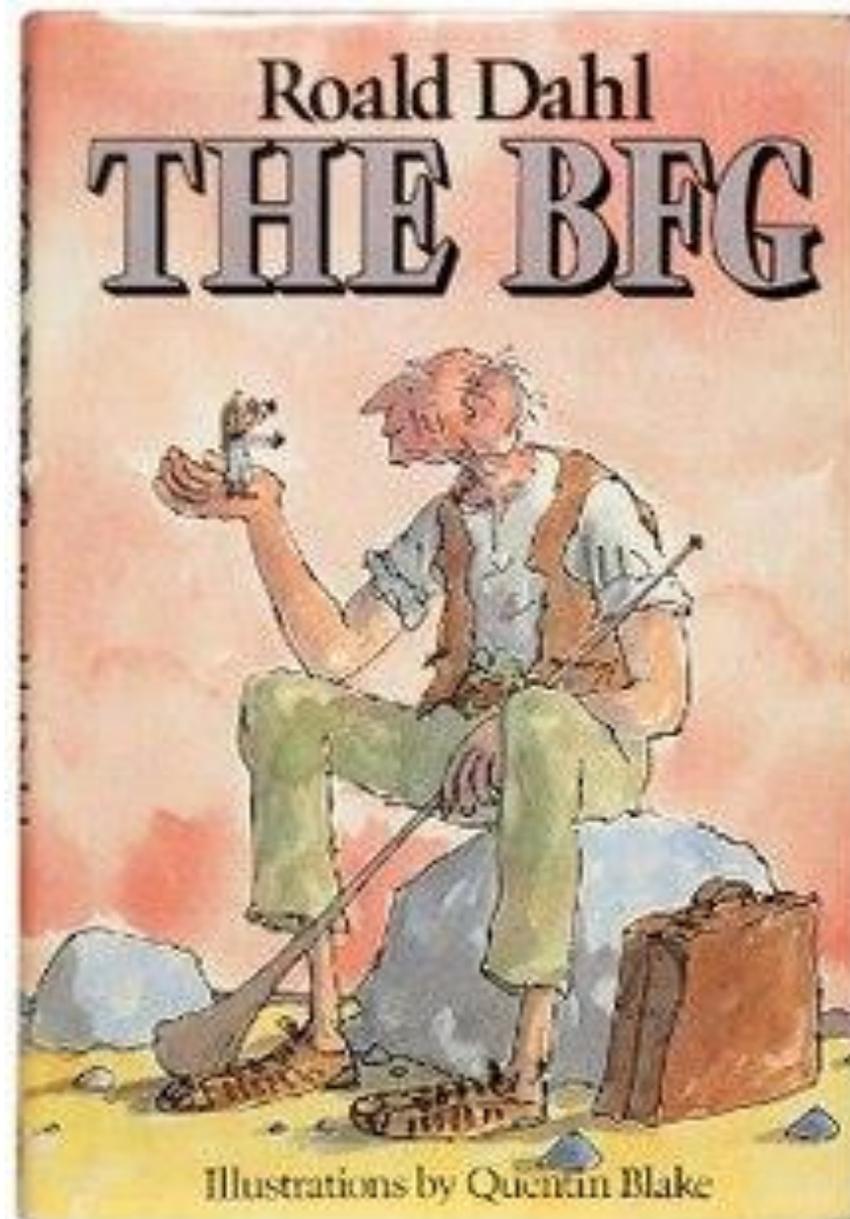
- **Due process**
 - §51.20(5)(a) and *Lessard*, 349 F. Supp. 1078
- **Notice**
 - Dangerousness subsection(s)?
 - Dangerous conduct?
- **Discovery** and interrogatory (Ch. 804)
 - What standard?
 - What conduct is or would be occurring?
- **Experts**
- **Investigation**
 - Medical records
 - Interviews

Recommitment Hearing

- **Currently dangerous?**
 - “Is or would be dangerousness”
- **Level of danger**
 - Substantial probability of physical harm ... serious physical injury ... or death
- **Standard**
 - Clear and convincing evidence
- **Expert testimony**
 - Object to hearsay about danger
- **Fact witnesses**
- **Client testimony?**

Appeal

- **Make a good record**
- **Discuss appellate rights w/ client**
- **Long road to win - LFG**
 - The County argues that “[w]e can assume that [LFG’s] behavior during the acutely psychotic period of non-treatment was dangerous because she eventually became the subject of an involuntary commitment that required the recommitment hearing at issue.”
With all due respect, no we cannot.
An involuntary mental commitment requires proof of a substantial likelihood of dangerousness by clear and convincing evidence, not assumptions or inferences.
- **If at first you don’t succeed...**



Questions?

