

**STATE OF WISCONSIN
IN SUPREME COURT**

STATE ex rel. J.J.H.

Petitioner,

v.

Appeal No. 2019AP000511-W

ANDREA PALM,
Secretary, Department of Health Services,

Respondent.

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
GRANTING WRIT AND REVIEW**

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ARGUMENT

I. INTRODUCTION

Language is the most basic tool of the courts. Lack of interpreting services prevents parties, victims, and witnesses from using the courts to meet their obligations and resolve their disputes. Without a skilled interpreter, a party who speaks or hears no English cannot listen to the testimony, challenge the evidence, or consult with an attorney. A person who cannot communicate with the judge faces a barrier as significant as a lock on the courthouse door.

Committee to Improve Interpreting & Translation in the Wisconsin Courts, *Improving Interpretation in Wisconsin's Courts*, p.5 (October 2000).¹ (App. at 102).

Disability Rights Wisconsin, the National Disability Rights Network, and the National Association of the Deaf respectfully request that this court grant the Petition for Habeas Corpus in this case and further, that this court grant the underlying petition for review in Case No. 2018AP168. This court has the power to allow the late filing of the petition for review under such circumstances. See *State ex rel. Schmelzer v. Murphy*, 201 Wis. 2d 246, 255–56, 548 N.W.2d 45, 49 (1996). This case presents circumstances which warrant both granting the Petition for Habeas Corpus and granting the Petition for Review.

¹ Available at <https://www.wicourts.gov/publications/reports/docs/interpreterreport.pdf> (last accessed April 11, 2019).

J.J.H.'s petition for review fully explains how her case meets the criteria for review set forth in Wis. Stat. §809.62(1r)(a), (b) and (c) (2) and (3). Further, she explains how the lack of an interpreter impairs a party's statutory and due process rights to hear, understand, and participate in proceedings; in this case, commitment proceedings. See PFR at 4, citing Wis. Stat. §885.38 and *Strook v. Keding*, 2009 WI 31, ¶17, 316 Wis. 2d 548, 766 N.W.2d 219. Therefore, these amicus parties do not repeat those arguments. Instead, they write to urge this court to grant review because this case presents this court with the opportunity to provide guidance on a problem which creates significant issues for Wisconsin citizens, which is within this court's purview, and which is very likely to recur. Because of the importance of the issues and the likelihood of recurrence, the court should also grant review and reverse the appellate court's conclusion that J.J.H.'s appeal was moot.

There is a limited number of accredited American Sign Language interpreters in Wisconsin. There are even fewer ASL interpreters who are certified for work in court proceedings. Issues arising from lack of available and appropriately qualified interpreters for court proceedings are likely to recur with increasing frequency. The lack of an interpreter has a substantial impact on the rights of

Wisconsin citizens in court proceedings, particularly proceedings which may curtail their constitutionally-protected liberty interests. Therefore, review is warranted to provide guidance to lower courts and litigants regarding this worsening problem.

II. THE DEEPENING COURT-QUALIFIED INTERPRETER SHORTAGE

There are about 500,000 people in Wisconsin who are deaf or hard of hearing. (Van Calster Aff., ¶3; App. at 106). This court has recognized that, in court, they may have differing interpreter needs:

A significant portion of the deaf population is best served by the provision of a deaf-hearing interpreting team accommodation ... [T]he deaf-hearing interpreting team consists of one deaf court interpreter and one court interpreter who can hear who work together in the transfer of meaning between ... spoken English and American Sign Language (“ASL”)....

... [M]any court interpreters who can hear and sign are not fluent in ASL. Courts assume that because a court interpreter can sign, the court interpreter can also interpret in a manner that is understandable to the deaf litigant. However, many certified interpreters who can hear are not fluent in ASL, have insufficient exposure to legal settings and will not have the knowledge or the linguistic skill required to satisfy the oath to interpret the proceedings accurately. The deaf interpreter ensures that the court interpreter is able to achieve the level of accuracy required in legal settings.

State v. Jones, 2010 WI 72, ¶10, n. 9, 326 Wis. 2d 380, 797 N.W.2d 378, quoting Carla M. Mathers, Nat'l Consortium of

Interpreter Educ. Ctrs., *Deaf Interpreters in Court: An Accommodation That Is More Than Reasonable* 6–7 (Mar. 2009). However, there is a limited number of accredited sign language interpreters in Wisconsin. (Van Calster Aff., ¶4; App. at 106). There are even fewer ASL interpreters certified for court proceedings. (Id., ¶5; App. at 107).

The Wisconsin Court System currently has only fourteen people on its official roster of certified court sign language interpreters.² (See App. at 108). HEAR Wisconsin is a nonprofit organization providing services to people across Wisconsin who are deaf or hard of hearing. (Van Calster Aff., ¶2; App. at 106). Its roster of interpreters helps evidence how few sign language interpreters are able to serve in court: the roster includes two on-staff interpreters and 25 freelance interpreters, but only three of these 27 interpreters are certified for court proceedings. (Id., ¶7; App. at 107).

Becoming a sign language interpreter generally requires not only a degree in interpretation but also accreditation by a national certification organization such as the Registry of Interpreters of the Deaf (RID). See Wis. Stat.

² Search function available at <https://www.wicourts.gov/services/interpreter/search.htm>

§440.032(3)(a)1 and Bureau of Labor Statistics³ (indicating that a bachelor's degree is typically required). However, as *Jones* explained, certification in sign language interpretation does not qualify a person to serve as an interpreter in legal proceedings.

This court is charged with “establish[ing] the procedures and policies for the recruitment, training, and certification of persons to act as qualified interpreters in a court proceeding...” §885.38(2). Since December 1, 2010, Wis. Stat. §440.032 has required all sign language interpreters who provide services for compensation to either be certified by this court or be licensed by the Wisconsin Department of Regulation and Licensing. To be certified by this court, ASL interpreters “must hold either NIC or CI/CT from RID or BEI Advanced or Master” just to attend orientation and participate in testing for Wisconsin court interpreter certification. See *Wisconsin Director of State Courts Court Interpreter Program (CIP) 2019 Training and Testing Schedule*.⁴ (App. at 109). The special requirements

³ Available at <https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm#tab-4> (last accessed April 10, 2019)

⁴ Available at <https://www.wicourts.gov/services/interpreter/docs/orientationtestingschedule.pdf> (last accessed April 10, 2019).

to be certified for court service greatly reduce the number of available interpreters. (Van Calster Aff., ¶5; App. at 107).

While RID continues to offer a general certification for sign language interpretation, the “NIC” referenced in the Training and Testing Schedule, it no longer offers special certification for court interpretation or the CI/CT certifications this court accepts as a prerequisite to certification for Wisconsin courts.⁵ (Van Calster Aff., ¶6; App. at 107).

RID’s general certification, the NIC, is deliberately rigorous to ensure only those interpreters who are qualified obtain it. A bachelor’s degree is a prerequisite.⁶ (App. at 111-112). To obtain certification, applicants must pass the NIC Knowledge Exam, submit proof of meeting the educational requirements, and then pass the NIC Interview and Performance Exam. (Id.) In 2017, RID administered 1,167 NIC certification exams.⁷ (App. at 115-117). While over 90% passed the Knowledge Exam in 2017, just over 25% passed

⁵ RID also had a moratorium on NIC credentialing from October 1, 2015 to November 2016. See <https://rid.org/rid-credentialing-moratorium-faq/> and <https://rid.org/2017-annual-report/casli/>

⁶ See RID’s certification requirements, listed at <https://rid.org/rid-certification-overview/available-certification/nic-certification/>

⁷ Test results available at <https://rid.org/2017-annual-report/casli/> (last accessed April 10, 2019).

the Performance Exam. (Id.) Thus, it appears that nationwide, at most about 250 people received NIC certification in 2017.

This court will also accept Board for Evaluation of Interpreters (BEI) certification but Wisconsin has not yet contracted with BEI to offer such certification here.⁸ Wisconsin residents cannot secure such credentialing nearby, either. Illinois offers BEI certification but is not accepting out-of-state applicants.⁹ Iowa and Minnesota do not appear to accept or offer BEI certification.¹⁰ Thus, there are currently challenges that limit the number of new sign language interpreters able to qualify to become certified as court interpreters in Wisconsin.

The Bureau of Labor Statistics has observed that “there are relatively few people with the needed skills” to provide sign language interpretation, but it predicts that

⁸ See <https://www.dhs.wisconsin.gov/odhh/bei.htm> (last accessed April 11, 2019)

⁹ <https://www2.illinois.gov/idhhc/licensure/Pages/Certification.aspx> (last accessed April 10, 2019)

¹⁰ For Minnesota and Iowa court interpreter information, see <http://www.mncourts.gov/Help-Topics/Court-Interpreter-Program.aspx> and <https://www.iowacourts.gov/opr/court-interpreters/how-to-become-an-interpreter/>

demand for American Sign Language interpreters will grow.¹¹ Wisconsin appears to be in the same predicament.

Wisconsin court personnel have complained of the difficulty in finding sign language interpreters for at least two decades. In *Improving Interpretation in Wisconsin's Courts*, the committee observed that approximately seven percent of Wisconsin citizens were people who were deaf or hard of hearing. *Improving Interpretation*, p. 5 (App. at 102). In an appendix, the report noted that court clerks had commented that:

- It is a constant struggle to schedule interpreters, especially at the last minute. There is a general increase in the need for all interpreters.
- It is difficult to find sign language interpreters.

Id., at 43 (App. at 104). In a three-month, seven-county survey of interpreter use from March to May 2000, “the seven counties had contacts with 1,124 people who required the use of an interpreter” for various languages in court proceedings, including for mental commitment. *Id.*, at 44 (App. at 105). One percent of the interpreters needed were for sign language. (*Id.*)

While the Wisconsin court system does not record statistics on unfulfilled requests for interpreters, it began to

¹¹ <https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm#tab-6> (last accessed April 10, 2019).

track interpreter use in 2012. State Justice Institute and National Center for State Courts, *Wisconsin Remote Interpreting: Needs Assessment for Developing a Pilot*, p. 27 (July 2014).¹² That study indicates that there was a total of 23,000 hours of interpreting in 2012 and 2013, combined. *Id.*, p. 5. Four percent of those hours were for ASL, tied with Hmong for second in frequency. *Id.*, p. 11 and Fig. 5. This calculates to about 920 hours for those two combined years.

That study found that the population of persons requiring interpretation services had grown 82 percent since 1990. *Id.* at 5. Wisconsin residents who are deaf or hard of hearing represented about thirty percent of the population potentially needing court services. *Id.*, at 9. Surveying the circuit courts revealed that most needed interpretation services for multiple days each month. *Id.*, at 12. In 2012, the Circuit Court of Dane County *Language Access Plan* reported weekly court use for persons using ASL.¹³

In 2017 alone, Wisconsin courts provided 20,636.75 hours of interpreter services, 85 percent of which were certified. (App. at 120-130). Reviewing that report reveals

¹² Available at <https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/350> last accessed April 11, 2019).

¹³ https://danedocs.countyofdane.com/pdf/court/Binder2_0.pdf, p. 3 (last accessed April 11, 2019).

that 667 hours of those services were for ASL interpreters, just over 3 percent of all interpreter hours, though only 67.32% of those hours were certified. (Id.) ASL-Deaf services totaled another 146.5 hours, 72.35 percent of which were certified. (Id.) Comparing these statistics to the combined 2012-2013 total reveals that the need for ASL interpreters increased from about 920 hours over two years to 813 hours in 2017 alone.

Despite this growing demand for sign language interpreters, Wisconsin's pool of certified court interpreters is unlikely to expand significantly, much less meet that demand. Therefore, the chance that sign language interpreters will not be available for hearings on short notice is likely to rise. As J.J.H. explained in her petition, Chapter 51, 54 and 55 cases often require hearings on short notice. And Wisconsin circuit courts opened almost 10,500 Chapter 51, 54 and 55 cases in 2018. (See PFR at 5)¹⁴ These statistics demonstrate that the unfilled need for an interpreter is likely to recur in such hearings.

¹⁴ Citing <https://wicourts.gov/publications/statistics/circuit/docs/caseloadstate18.pdf>.

III. SOME WISCONSIN HEARINGS PROCEED WITHOUT INTERPRETERS.

J.J.H. points out that Waukesha County twice, within three days, held hearings regarding her without providing qualified sign language interpreters. (PFR at 4). The circuit court conducted an initial appearance in Case No. 2017CM1678 on September 12, 2017, and it held the probable cause hearing at issue here on September 15, 2017. (Id; see also Pet.App.139-140).

Hers is not the only case in which a circuit court has held a hearing without an interpreter. Although it is a small agency which does not formally track such issues, Amicus Disability Rights Wisconsin has received multiple complaints from its clients regarding problems with interpreters in just the past five years, including complaints that interpreters were available at only some of the hearings held in a case or that interpreters would not be provided for their hearings. (Kerschensteiner Aff., ¶ 5; App. at 131-132).

Reviewing CCAP entries reveals that other hearings have also proceeded without interpreters. These amicus parties list just some examples: In Waukesha County Case Number 2018CF000260, *State of Wisconsin vs. Beau La*, the interpreter failed to appear at an April 16, 2018, hearing; the court proceeded without an interpreter because the defendant was incompetent. In Milwaukee County Case No.

2018CF005722, *State of Wisconsin vs. Johnny San*, a December 5, 2018 CCAP entry states: “No interpreter used at initial appearance,” though the entry noted the need for a Burmese language interpreter for future proceedings.

In Milwaukee County Case No. 2018CF003108, *State of Wisconsin vs. Thomas R Klante*, sign language interpreters were required (see July 6, 2018 entry), but the parties waived the interpreter for a hearing held August 1, 2018. And in Milwaukee County Case No. 2018GF000195, *Group File of Rodrigo Herrera*, a party petitioned for return of property on August 20, 2018. CCAP stated that, because the hearing was set for nine days later, the Interpreter Coordinator could not guarantee that an interpreter would be available due to the short notice. The CCAP entry for August 29, 2018, shows that no interpreter appeared and the hearing had to be adjourned until nearly a month later.

Yet in other cases, courts have rescheduled hearings when an interpreter could not be secured for a non-party. For example, in Waukesha County Case Number 2018CF000634, *State of Wisconsin vs. Zane K Houlihan*, ASL interpreters were needed for the defendant’s parents. The July 31, 2018, CCAP entry indicates that the court was unable to schedule an interpreter for a hearing scheduled

over a month later, necessitating that the hearing be rescheduled.

This lack of uniformity suggests that review is warranted to provide guidance to lower courts respecting when adjournment is required if interpreters are not available.

IV. THE COURT SHOULD GRANT REVIEW TO ADDRESS MOOTNESS.

The court of appeals dismissed J.J.H.'s appeal as moot on the grounds that "the precise situation" presented here did not arise frequently enough to warrant a decision. (Pet.App.105). As these amicus parties have demonstrated, the likelihood of a recurrence is high given the lack of appropriately-qualified, court-certified sign language interpreters and the high number of both people who are deaf or hard of hearing, and of commitment hearings in Wisconsin.

In *In re Melanie L.*, 2013 WI 67, ¶¶ 79-80, 349 Wis. 2d 148, 833 N.W.2d 607, this court explained that it could decide an otherwise moot issue if the issue:

(1) is of great public importance; (2) occurs so frequently that a definitive decision is necessary to guide circuit courts; (3) is likely to arise again and a decision of the court would alleviate uncertainty; or (4) will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties.

Id. (footnote omitted). The issues raised in this case are of great public importance given their significant impact on the party's constitutionally-protected liberty interests, and they are likely to recur in future cases.

Additionally, as J.J.H. has explained, these issues are likely to evade appellate review because the type of commitment order she appealed always expires before an appeal can be completed. For this reason, as well, this court should grant review, in order to provide guidance to lower court on an issue otherwise unable to be reviewed.

CONCLUSION

“[I]nterpretation and translation are essential to providing meaningful access to the courts and to maintaining the integrity of our justice system.” U.S. Department of Justice Civil Rights Division Federal Coordination and Compliance Section, *Language Access in State Courts*, p. 1 (September 2016). Holding hearings without an appropriate sign language interpreter leaves persons who are deaf or hard of hearing, like J.J.H., essentially locked out of the proceedings. *Amicus curiae* Disability Rights Wisconsin, the National Disability Rights Network, and the National Association of the Deaf urge this court to grant the Petition for Habeas Corpus, and then,

applying the reasoning of *Melanie L.*, exercise its discretion to take up the issues that J.J.H. has asked it to review.

Respectfully submitted this 15th day of April, 2019.

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**CERTIFICATE OF FORM, LENGTH,
AND ELECTRONIC FILING**

I hereby certify that:

This brief conforms to the rules contained in [Wis. Stat. § 809.19\(8\)\(b\) and \(c\)](#) for a brief and appendix produced with a proportional font. The length of this brief is 2757 words.

I have submitted an electronic copy of this brief and appendix, which complies with the requirements of [Wis. Stat. § 809.19\(12\) and \(13\)](#). The text of the electronic brief is identical to the printed form of the brief filed as of this date. The content of the electronic appendix is identical to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all parties.

I hereby certify that filed with this brief an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court entries (supplied by petitioner);
- (3) the findings or opinion of the circuit court (supplied by petitioner); and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues (supplied by petitioner).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are

reproduced using the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references in the record.

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(3). This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 15th day of April, 2019.

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**CERTIFICATION OF THIRD-PARTY COMMERCIAL
DELIVERY**

I certify that on April 15, 2019, this brief and appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief and appendix was correctly addressed.

Date: _____

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